LIST OF SMSC COURT OF APPEALS OPINIONS

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IN THE COURT OF APPEALS
OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Corey Lee Farrell,
Appellant,

v.

Ashley Rose Farrell n/k/a
Ashley Rose Friendshuh,
Appellee.

File No. Ct App. 039-13

OPINION

Factual Background

The Appellee, Ashley Rose Friendshuh, and the Appellant, Corey Lee Farrell, were married on October 29, 2007. Friendshuh is a member of the Shakopee Mdewakanton Sioux Community ("the Community"); Farrell is not a member of any federally recognized Indian tribe. The parties are the parents of one child, who is six years old and who is a member of the Community. The parties were divorced on February 2, 2010, by Order of the Community's Trial Court. The Court's Order adopted, in its entirety, an agreement (the "Agreement") that the parties had negotiated. The Agreement took the form of Stipulated Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree. Both parties were represented by counsel during the negotiations that led to the Agreement.

Under the Agreement, the parents agreed "to provide a safe, secure, and drug-free environment when the parties' minor child is in their care and custody."[1] The parents shared joint legal custody of their child; Friendshuh was awarded sole physical custody and Farrell was awarded "co-equal parenting time," which effectively gave him custody of the child

[1] Stipulated Findings of Fact, ¶ 18.

approximately one-half of the time.[2] Notwithstanding this arrangement, Friendshuh agreed to pay child support to Farrell, in the initial amount of $4,000 per month.[3] In the portion of the Decree relating to this stipulated support amount, the parents submitted, and the Trial Court adopted, the following statement:

> While this is an upward deviation from the Community's child support guidelines and [Friendshuh] is receiving sole physical custody of the parties' minor child, [Friendshuh] agrees that this deviation is appropriate based on continuing the standard of living the child has been used to while the child is in [Farrell's] care and [Friendshuh's] desire to maintain that standard of living for the child.[4]

After their marriage was dissolved, matters stood as the Agreement and the Trial Court's Order contemplated until late May, 2012, when police raided Farrell's home and arrested him on charges relating to drugs and drug paraphernalia that were found in the home. In response to those events, the Community commenced a Children's Court proceeding, which resulted in the Court first suspending Farrell's parenting time, and then restoring it on a limited basis subject to supervision. Consequently, given the parties' changed circumstances, Friendshuh filed a motion to modify her child-support obligation. On November 19, 2012, without making Findings of Fact, the Trial Court granted that motion and reduced Friendshuh's support obligation to $1,000 per month "until further Order of the court." Thereafter, on July 17, 2013, the Children's Court proceeding was closed pursuant to a stipulation of the parents and the Community. In closing the file, the Court found that Farrell had complied with his case plan and that additional parenting-time provisions, aimed at addressing ongoing concerns about the child's safety had been agreed to and were appropriate.

Farrell then filed a motion seeking reinstatement of the originally-ordered support payments, to which Friendshuh objected, asking that the reduced amount of $1,000 per month be retained. But the Trial Court did neither. Instead, on October 17, 2013 the Trial

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[2] *Id.*

[3] *Id.* at ¶ 22. In accordance with the parties' Agreement, the monthly child-support payments were reduced somewhat after the parties' divorce because the payments that Friendshuh received from the Community were reduced.

[4] *Id.*

Court concluded that there was no legal basis under the Shakopee Mdewakanton Sioux (Dakota) Community Domestic Relations Code (the "Code") for imposing any child-support obligation on either parent. The Trial Court therefore vacated its previous award of support to Farrell.

This appeal followed.

Domestic Relations Code Provisions Relating to Child Support

At all relevant times, the Code has contained a number of provisions dealing with child support in marriage-dissolution proceedings. Chapter III, Section 7.a. of the Code provides that, in such proceedings, "[c]hild support shall be paid by the non-custodial parent as follows . . .," and sets forth a table enumerating the percentage of net income that comprises appropriate support for varying income levels and numbers of supported children. The same section also discusses in detail the manner in which calculations are to be made using the table, and it defines cash flows that are and are not to be considered "net income."

Chapter III, section 7.b. of the Code provides:

> **b. Other factors.**
>
> In addition to the child support guidelines, the Court shall take into consideration the following factors in setting or modifying child support:
>
> (1) The physical, mental and emotional needs of the child(ren) to be supported, as documented by medical professionals or experts working directly with the child(ren). Said services shall be necessary for the child(ren) to maintain a healthy existence and may include therapy; medical, psychological, behavioral or chemical dependency treatment; accommodations for special physical or mental needs and special educational requirements in excess of that which is covered by Tribal insurance or programs. Said services shall not include those items which affect the lifestyle of the child, including but not limited to private school attendance and extra-curricular activities; and
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> (2) The amount of the aid to families with dependent children grant for the child or children; and

(3) Which parent receives the income taxation dependency exemption and what financial benefit the parent receives from it; and

(4) The parents' debs as provided in subsection (c) [of Chapter III, section 7.b.]

The Court shall not consider the following factor(s):

(1) The standard of living the child would have enjoyed had the marriage not been dissolved; had the parents resided together or continued to reside together.

Chapter III, section 7.d. of the Code sets forth circumstances that will authorize the Court to exceed the Guidelines:

d. When guidelines may be exceeded or modified.

(1) The Court may receive evidence to determine if an upward departure from the child support amount delineated in the guidelines is appropriate and necessary for the child(ren). An upward departure from the guidelines shall only occur if the child has medically documented physical, mental or emotional needs, including chemical dependency and learning disability needs, which require professional intervention or oversight and exceed those services provided by Tribal insurance or programs.

(2) If the Court finds that the child's needs as provided herein require additional financial support, beyond that covered by Tribal insurance or programs, the Court may, under the above conditions and upon issuance of written findings to that effect, award necessary and additional child support in a total amount not to exceed $5,000 per family unit. ...

And Chapter III, section 7.e. provides –

e. Nature of guidelines.

The above guidelines are binding in each case unless the Court makes express findings of fact as to the reason for departure below or above the guidelines. Said findings shall be express and shall address each of the areas of consideration. In addition, valid medical documentation shall be filed with each request for an upward departure from the guidelines.

In addition, Chapter III, section 7.g. of the Code speaks in detail as to when and how a child support order may be modified:

g. Modification of Child Support Award.

(1) After an order for child support, the Tribal Court may from time to time, on motion of either of the parties or on motion of the public authority responsible for support enforcement, modify the order, and may make an order respecting these matters which it might have made in the original proceeding, except as herein otherwise provided.

(2) The terms of a decree respecting child support may be modified upon a showing of one or more of the following:

(i) substantially increased or decreased earnings of a party;
(ii) substantially increased or decreased need of a child for which support is ordered;
(iii) receipt of public assistance;
(iv) a change in the cost of living for either party measured by the federal bureau of statistics;

On a motion for modification of child support, the Tribal Court shall:

(v) take into primary consideration the needs of the children and shall not consider the financial circumstances of each party's spouse, if any;
(vi) not consider compensation received by a party for employment in excess of a 40-hour work week, provided that the party demonstrates, and the Court [makes findings not relevant to these proceedings].

(3) A modification of child support may be made retroactive only with respect to any period during which the petitioning party has pending a motion for modification but only from the date of service of notice of the motion on the responding party. However, modification may be applied to an earlier period if the Court makes express findings that the party seeking modification was precluded from serving a motion by reason of a significant physical or mental disability or a material misrepresentation of another party and that the party seeking modification, when no longer precluded, promptly served a motion.

Finally, Chapter III, section 7.h. of the Code speaks to termination of child support, as follows:

> **h. Termination.**
>
> Unless otherwise agreed in writing, with Court approval, or expressly provided in the decree, provisions for child support are terminated by emancipation of the child but not by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump sum payment, to the extent just and appropriate in the circumstance.

Notably, no section of the Code discusses the Court's role in situations where divorcing parents have come to an independent agreement with respect to child support and have sought the Court's approval of their agreement. The Code is also silent on situations where child custody is more or less equally shared by the parents.

Discussion

In concluding that it had no power under the Code to award of child support to either parent, the Trial Court said:

> The court agrees with the observation that each parent has an obligation to financially support their children. But the court is limited in the setting of an award if the parents share equally in the care of the child. The Domestic Relations Code in Section 7(a) states that "Child support shall be paid by the non-custodial parent . . .." Here the parents submitted a Parenting Plan which was adopted by Order of this court on July 17, 2013. This Plan by its nature and intent establishes a schedule and decision-making by the parents with respect to the child that clearly creates joint custody and responsibility for equal care of the child in each of their homes. It is evenly divided to the point where *there is no non-custodial parent which is required of the court to set an award of child support.*[5]

[5] Memorandum Opinion and Order at 5. (October 17, 2013) (emphasis added).

In his appeal, Farrell argues that this was error because it ignored the fact that, when they divorced, the parties *had agreed* that Friendshuh would pay child support at a stipulated amount, pointing to a decision of the Minnesota Court of Appeals, *O'Donnell v. O'Donnell*, which held that there was no basis for modifying a child support award that deviated from Minnesota's support guidelines:

> [W] here, as here, the parties entered into a stipulated agreement, where both were represented by counsel, where respondent had been actively involved in caring for the children prior to the dissolution and had sufficient opportunity to assess their needs and expenses, where the parties are well educated, where there is no allegation of fraud, mistake, or duress, and most importantly, where there is no claim or finding that the best interests of the children necessitate a change or were adversely affected by a continuation of the support terms of the original judgment.[6]

He also argues that the "law of the case" doctrine precluded the Trial Court's revisiting its 2010 decree; that the Trial Court abused its discretion by modifying child support without finding the changed circumstances that Chapter III, section 7.g. of the Code requires; and that, if the Code is read not to permit the award of child support in circumstances where parents are sharing parenting responsibility, that failure works a harm to the children that it affects.

In our view, however, each of Farrell's first three arguments fails, and each fails for the same reason: Friendshuh's agreement that child support would be paid at a higher-than-Guidelines level was not unconditional. Effectively, she contracted to pay that higher amount in return for Farrell's agreement "to provide a safe, secure, and drug-free environment when the parties' minor child is in [his] care and custody." And it is important for us to stress, here, that nothing in the Code forbids such an agreement – as the Trial Court clearly believed in 2010 when it approved the Agreement. When the General Council of the Community amended the Code to limit the reasons for which upward deviations from Guidelines-level child support can be made, it did not speak to voluntary agreements by Community members. Rather, General Council Resolution 05-15-01-01 stated that its purpose was to clearly specify the limits on "the exercise of discretion *by the Tribal Court in*

[6] 678 N.W.2d 471, 476 (Minn. Ct. App. 2004).

determining awards of child support." Hence, when Friendshuh agreed to pay $4,000 per month to Farrell to ensure that their child would continue to have the standard of living to which he had been accustomed, that was something that the law of the Community permitted, and the Trial Court did not exceed its authority when it approved that arrangement.

But when Farrell failed to live up to his end of that bargain, we think it is fair to conclude that the Trial Court could properly relieve Friendshuh of her obligation. This was neither a deviation from the Trial Court's original decree that was inconsistent with the "law of the case" doctrine, nor was it the sort of modification of Court-ordered support that is the subject of Chapter III, section 7.g. Rather, it was a consequence implicit in the Agreement, and therefore also in the Trial Court's original decree. We conclude, therefore, that the Trial Court did not abuse its discretion when it held that Friendshuh was no longer is obligated to pay Farrell child support at the level contemplated by the Agreement.

But matters stand differently as to the Trial Court's conclusion that it lacked the power to award any child support at all. There is considerable force in Farrell's argument that if the Code does not allow the establishment of support obligations when parents are sharing parenting responsibility, the effect could well be to discourage such sharing, to the detriment of children. We therefore are reluctant to read the Code that way.

Rather, we think it is reasonable to read Chapter III, section 7.a. of the Code, which begins with the statement, "Child support shall be paid by the non-custodial parent as follows . . ." to contemplate a situation where, if parents are sharing custody, *each* is a non-custodial parent for the fraction of time that the child is in the custody of the other parent. This reading certainly is permitted by the section's language, and in our view it is more consistent with the best interests of the affected children – which was of fundamental importance to the Community when it gave this Court domestic-relations jurisdiction – than is the Trial Court's interpretation of the section.

Under the Guidelines, the "income ceiling" that is used to calculate support obligations is $7,794.29,[7] and therefore a non-custodial parent who is paying support for one

[7] This amount is a function of cost-of-living increases to the ceiling, worked by Chapter III, section 7.f. of the Domestic Relations Code.

child, and whose income exceeds the maximum specified in the Guidelines (as Friendshuh's concededly does), would be obliged to pay 25% of that ceiling amount, or $1,948.57, per month to the custodial parent. Given our reading of Chapter III, section 7.a. then, because of the parties' shared custody arrangement, we conclude that Friendshuh's obligation should be half that amount, or $974.28 per month, unless the specific factors set forth in Chapter III, sections 7.b. and 7.d. of the Code authorize an upward deviation. Having reviewed the record, we find no physical, mental, or emotional needs of the parties' child that would justify an upward deviation.[8]

We therefore reverse the Trial Court's order and remand to the Trial Court for entry of an order awarding child support from Friendshuh to Farrell in the amount of $974.28 per month, retroactive to the first month in which Friendshuh did not pay child support in reliance on the Trial Court's October 17, 2013 Order. The Trial Court shall have discretion, pending argument from or agreement of the parties, to determine whether Friendshuh should pay this retroactively awarded child support in a lump sum or in installment payments.

Dated: April 2, 2014

Chief Judge John E. Jacobson

Judge Vanya Hogen Moline

Judge Jill E. Tompkins

[8] We note, though, that our reading of the Guidelines could also justify an award of child support to Friendshuh from Farrell if he has "net income" as that term is defined by Chapter III, section 7.a. of the Code. But whether Farrell has "net income" is not established in the record before us, and in any event, Friendshuh has not thus far requested child support from Farrell.

COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

In Re the Marriage of:
Cyndy Stade-Lieske,

Appellee/Petitioner,

App. Court File: 040-14

v.

Joseph Stephen Lieske,

Appellant/Respondent.

Opinion and Order

Before JACOBSON, HOGEN MOLINE, and MASON MOORE, Appellate Judges.

I. Introduction.

This appeal is from a marriage-dissolution action between Joseph Stephen Lieske ("Husband") and Cyndy Stade-Lieske ("Wife"). There are two issues before this Court:

1. Did the Trial Court abuse its discretion by awarding temporary maintenance to Husband for a period of 18 months?

We hold that it did.

2. Did the Trial Court abuse its discretion in its division of the parties' personal property?

We hold that it did not.

last four years of their marriage, Wife paid Husband $8,000 a month, of which $2,000 was his "allowance," and the remainder was to pay the parties' joint bills and to "put money away for a rainy day."

Once the parties separated, Husband secured a full-time position as a welder with Natural Light Fabric Structures.[17] He makes $15 an hour for 40 hours per week and $22.50 for any overtime after that.[18] The Trial Court found that his gross monthly income is $2,598.[19] It also found that his average overtime earnings per month are $487.13, [20] making his gross monthly income $3,085.13 per month.[21] His employer also pays his medical and dental insurance and has a 401(k) matching program.[22]

Currently Wife receives $64,706 per month in per-capita payments from the Community.[23] Wife is also now self-employed through her business In A Pickle, for which she earns around $550 a month.[24]

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[17] *Id.* at 164.
[18] *Id.* at 166–67.
[19] *Id.*
[20] *Id.*
[21] *Id.* The Trial Court found that Husband failed to provide "any evidence on his income tax rate or anticipated taxes." Trial Court Order at 10, § XII(D). Husband contests this on appeal by pointing out that Husband offered pay stubs with itemized tax deductions. Appellant's Br. at 32.
[22] Tr. at 168.
[23] Trial Court Order at 4, § X.
[24] *Id.*

B. Spousal Maintenance Award

The Trial Court's analysis properly started with Section 6 of the Community's Domestic Relations Code (the "Code").[25] The Code dictates that the following factors must be considered when deciding if spousal maintenance is proper upon the dissolution of a marriage: "the length of marriage; contributions, financial and nonfinancial, of both spouses; the standard of living to which each spouse has become accustomed; the financial needs of both spouses; and any other factor the Court finds appropriate."[26] While the Trial Court nominally addressed each factor, it did not explain how the factors combined to lead to the conclusions that Husband should (a) receive only temporary maintenance and (b) should receive only $1,000 per month for 18 months.

C. Property Division

The factors for property division are the same as they are for spousal maintenance.[27] The Trial Court started by awarding wife her per-capita payments and the marital home.[28] It also ordered a number of items the parties were not contesting, including furniture and household items, Wife's jewelry, the parties' respective collectables, the In a Pickle business,

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[25] Code, Ch. III, § 6.
[26] *Id.*
[27] *Id.*
[28] Trial Court Order at 10, §§ XIII & XIV.

and the bank accounts.[29] The court went into a lengthy discussion about the different vehicles the parties owned and whom they would go to.[30] Of the many vehicles the parties purchased throughout the marriage, Husband received two of them.[31] Husband was awarded a 2012 Harley Davidson Motorcycle and a 2008 Ford F450 Pickup.[32] The rest of the vehicles were awarded to Wife because otherwise, the Trial Court held, it would "be an impermissible invasion of Wife's per-capita payments" since the vehicles were purchased with per-capita payments.[33]

Finally, the court awarded Husband all tools currently in his possession as well as "two drill presses, the brake press, the tube bender, the sheer, one drill, one sander, the sand blaster, the frame jig and the small Indian motorcycle."[34] Wife was awarded the remaining tools left in the shop within the marital home.[35]

III. Analysis

A. Standard of Review

In reviewing a maintenance award, we apply an abuse-of-discretion standard to the trial court's determination of the amount and duration of an award of spousal

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[29] *Id.* at 16-18, §§ XVII–XXI.
[30] *Id.* at 11-16, § XVI.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 18, § XXII.
[35] *Id.*

maintenance.[36] To decide whether a trial court has abused its discretion with respect to a maintenance award, we review its findings of fact to see if they are clearly erroneous, and its conclusions of law *de novo*.[37]

> The same standard applies to a trial court's division of property. A trial court enjoys "broad discretion in evaluating and dividing property in a marital dissolution and will not be overturned except for abuse of discretion. We will affirm the trial court's division of property if it had an acceptable basis in fact and principle even though we might take a different approach." *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). The [trial] court abuses its discretion in dividing property if its findings of fact are "against logic and the facts on the record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).[38]

With these standards in mind, we turn to the Trial Court's maintenance award and property division.

B. The Maintenance Award

The Tribal Court may award spousal maintenance in the absence of antenuptial contracts or settlement stipulations (neither of which were present here). As noted above, in so doing, the Trial Court must consider "length of the marriage; contributions, financial and non-financial, of both spouses; the standard of living to which each spouse has become accustomed; the financial needs of both spouses, and any other factor the Court finds

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[36] *See, e.g., Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. Ct. App. 3009). *See also* Welch *v. Welch*, 2 Shak. A.C. 11, 17 (Apr. 15, 2009) (citing *Chamberlain v. Chamberlain*, 615 N.W.2d 405, 409 (Minn. Ct. App. 2000) (other citations omitted)).

[37] *Id.*

[38] *Schisel v. Schisel*, 762 N.W.2d 265, 273 (Minn. Ct. App. 2009).

appropriate."[39] This means the court "does have the power—and the duty—to consider the position that a marriage dissolution will leave the former partners, and to order that a fixed stream of payments be made to protect the more vulnerable party from an inequitable change in his or her life's circumstances."[40]

> Moreover, we agree with the Minnesota Supreme Court that
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> > [c]ertainly, dissolution of a long-term marriage creates financial problems for both parties and equity does not demand absolute parity in their post-dissolution positions, but the bulk of the economic burden should not be visited on one party without regard to the parties' standard of living during the marriage and without regard to that party's now limited ability to complete in the labor market.[41]

In this case, we agree with Husband that the Trial Court's decision visited the bulk of the economic burden of the dissolution on him.

1. Length of Marriage

The first factor we must examine is the length of the marriage.[42] In this case, the Trial Court found that the parties were married for 18 years, but didn't explain how that fact weighed in its analysis.[43] Generally, the longer the marriage, the greater the chances that

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[39] Code, Ch. III, § 6. Misconduct by either party is irrelevant to the spousal maintenance award. *Id.*

[40] *Welch v. Welch*, 5 Shak. T.C. 127,130 (Aug. 18, 2008), *aff'd in part and rev'd in part, Welch v. Welch*, 2 Shak. A.C. 11 (Apr. 15, 2009) (plurality opinion).

[41] *Nardini v. Nardini*, 414 N.W.2d 184, 198 (Minn. 1987).

[42] Code, Ch. III, § 6.

[43] Trial Court Order at 8, § XII.A.

maintenance will be awarded, particularly where one spouse is out of the workforce during the entirety of the marriage. Yet in this case, the fact that the parties were married for a relatively long time seemed to play no role in the court's award, which we find to be an abuse of discretion. At a minimum, on remand, the Trial Court must clarify how the length of the parties' marriage affects the amount and term of a maintenance award.

2. Financial and Non-Financial Contributions

Community law requires that we next consider the parties' financial and non-financial contributions to the marriage. In this case, Husband stopped working shortly after he and Wife began dating because Wife "wanted [him] to stay at home and help out,"[44] and, with Wife's assent, he remained unemployed throughout the marriage. Husband stipulated that he made no financial contributions to the marriage.[45] Husband did, however, make non-financial contributions by doing yard work, home maintenance, cleaning, and handling the parties' finances.[46] He also spent time fixing the parties' vehicles and motorcycles.[47] Finally, while Wife's children were young, he also helped care for them by driving them to

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[44] Tr. at 172

[45] Tr. at 36.

[46] *See* Trial Court Order at 9, § XII (B); Tr. at 172-173.

[47] Tr. at 177-180.

and from their father's house, driving them to and from school, and helping them with homework.[48]

Almost all of the financial contributions for the marriage came from Wife's per-capita payments, which, at the time of trial, were $64,706 per month.[49] Wife also made approximately $550 per month from her business selling home goods at parties.[50] The Trial Court made no findings about Wife's nonfinancial contributions to the marriage; she testified that she was the primary caretaker for her children when they were with her, and that she would help "cook and clean here and there, sometimes do laundry."[51]

As with the length-of-the-marriage factor, the Court took note of (most of) these facts, but failed to explain how they impacted its decision to award only $1,000 per month in temporary maintenance for 18 months. Rather, the court devoted most of its findings in this regard on how much Husband *spent* during the marriage, noting "[t]he Court is left with the firm impression that not only did Husband not make any financial contributions to the parties' marriage, he caused the parties' financial assets to be significantly diminished."[52]

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[48] Tr. at 165. *See also* Trial Court Order at 9, § XII(B).
[49] Trial Court Order at 4, § X and at 8, § XII(B).
[50] *Id.* at 4, § X.
[51] Tr. at 41-42.
[52] Trial Court Order at 9, § XII(B).

The Court blamed Husband for the fact that "the parties have no investment or retirement accounts."[53]

In fact, the record is clear that both parties spent a significant amount of Wife's per-capita payments during the marriage. They did a great deal of traveling, often to Disney World, which was Wife's preferred destination.[54] And *both* spouses spent significant amounts on gambling, with Wife spending *hundreds of thousands* of dollars per year on gambling in 2010, 2011, 2012, and 2013.[55]

They also purchased many vehicles, most of which were encumbered by loans.[56] Several of these were in furtherance of Husband's drag-racing hobby, in which Wife also took an interest.[57]

We find that the Trial Court abused its discretion by placing no value on Husband's non-financial contributions to the marriage. We note, as Husband did on appeal, that the Trial Court adopted Wife's proposed findings of fact and conclusions of law almost verbatim.[58] We agree with the Minnesota Court of Appeals that "wholesale adoption of one

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[53] *Id.*

[54] Tr. at 116-117; 175. Husband testified that "[a]fter a while I tried to get out of the Florida trips. You can only go to Disney so many times." *Id.* at 175.

[55] *See* Petitioner's Exhibits 4-7,9-10.

[56] *See, e.g.*, Trial Court Order at 11-16 (listing 15 vehicles owned at dissolution).

[57] Tr. at 123, 180-184.

[58] *Compare* Trial Court Order *with* Petitioner's Proposed Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree, attached to Appellant's Brief.

party's findings and conclusions raises the question of whether the trial court independently evaluated each party's testimony and evidence."[59] While the Trial Court reached its own conclusion about awarding maintenance—it awarded $1,000 per month for 18 months whereas Wife had proposed no maintenance at all—it is perhaps because the Trial Court adopted the vast majority of Wife's findings as its own that the findings do not match the evidence presented in some instances. For example, we hold that it was clear error to find that it was Husband's fault alone that the parties didn't have investment and retirement funds set aside during their marriage.

Although the Trial Court found more facts pertaining to this component than the last, the analysis is still incomplete. The court didn't indicate which outcome (awarding or not awarding spousal maintenance) the facts support. Certainly, no one can deny that Wife contributed the most financially to help the marriage and that weighs in her favor. But the fact that she also requested Husband quit his job weighs in favor of awarding spousal maintenance. The non-financial-contribution evidence demonstrates that Husband made significant contributions, and the Court should consider those in its analysis on remand.

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[59] *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. Ct. App. 1993) (citing *Bersie v. Zycad Corp.*, 417 NH.W.2d 288, 292 (Minn. Ct. App. 1987)).

3. Standard of Living

The third factor in the maintenance analysis is "the standard of living to which each spouse has become accustomed."[60] During the marriage, the parties maintained a high standard of living—traveling frequently, purchasing numerous vehicles, and living in a house valued at $850,000. We agree with the Trial Court that the parties overspent during their marriage, as demonstrated by "the fact that the parties have significant debt tied to vehicles without any investment or retirement accounts. The parties have little by way of equity in any of the assets they currently have."[61]

We also agree with the Trial Court's conclusion that "[t]he standard of living established during the marriage is not maintainable by either party."[62] Because divorce requires establishing two households instead of one, it is almost always true that both parties will not be able to maintain the same standard of living once divorced that they enjoyed while married.[63] But the fact that parties cannot continue to live at the marital standard of living does not mean that the party with less income must get by with only "the bare necessities of life" while the other spouse maintains a high standard of living.[64] The

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[60] Code, Ch. III, § 6(a).
[61] Trial Court Order at 10, § XII(C).
[62] *Id.* at 9, § XII (C).
[63] *See, e.g., Nardini,* 414 N.W.2d at 198.
[64] *See, e.g., Arundel v. Arundel,* 281 N.W.2d 663, 666 (Minn. 1979) (reviewing permanent-maintenance award to 51-year-old stay-at-home spouse leaving a 29-year marriage).

court's job is to determine how to fairly allocate resources, including by awarding maintenance, so both spouses can maintain reasonable standards of living.[65]

We recognized in *Welch* "that the unique character of per capita income is a proper factor for the Trial Court to consider in evaluating a request for spousal maintenance, including the fact that the nonmember seeking spousal maintenance cannot be considered to have assisted in generating it."[66] Because of that, we find it reasonable that a member spouse may continue to enjoy a higher standard of living post-divorce than the non-member spouse. That does not mean, however, that the standard of living to which the non-member spouse has become accustomed is irrelevant to the maintenance analysis. The fact that a member spouse receives per-capita payments and can afford to support a reasonable middle-class lifestyle for a non-member spouse must be taken into account, and we direct the Trial Court to do so on remand.

4. Financial Needs

The fourth factor we must consider in maintenance awards is the "financial needs of both spouses."[67] Although the analysis is not explicit, it appears the Trial Court relied on *Welch v. Welch*, which held that "what are commonly considered luxury items cannot be considered to serve to meet 'financial needs,' even if a party has become accustomed to

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[65] *Id.* at 667-668.
[66] 2 Shak. A.C. at 22.
[67] Code, Ch. III, §6(a).

them over time,"[68] to reduce or reject many of the items in Husband's proposed budget.[69] In so doing, the Trial Court again adopted Wife's proposed findings nearly word-for-word, including finding that Wife's budget—which included luxury items such as $3,000 per month for vacations and $325 per month for car washes[70]—was reasonable. We hold that the Trial Court abused its discretion in rubber-stamping all of Wife's financial needs and rejecting certain of Husband's financial needs, and remand for findings consistent with this opinion.

a. Husband's Financial Needs.

As noted above, Husband stopped working at Wife's suggestion and remained unemployed throughout the entire 18-year marriage. At the time he quit working, he was employed at Mystic Lake Casino doing maintenance.[71] The record reflects that he does not have a high-school diploma, and although he received his GED, he had no other training or education after high school.[72] Yet despite having little education or training and having been out of the workforce for almost 20 years, Husband sought and found a full-time job as a welder with Natural Light shortly after separating from Wife.[73]

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[68] Trial Court Order at 9, § XII(C) (citing *Welch*, 2 Shak. A.C. at 13).
[69] *See* Trial Court Order at 6-8, §§ XI (J-Y).
[70] *Id.* at 4, § X (citing Wife's Exhibit 11).
[71] Tr. at 169.
[72] *Id.* at 169-70.
[73] *Id.* at 163-64.

At the time of trial, Husband was earning $15 per hour with time and a half for overtime, and received health and dental insurance through his employer.[74] He had the opportunity to contribute to a 401(k) plan through his employer but had not had the funds to do so.[75] In fact, because he had been out of the workforce so long, Husband has no retirement savings.[76] Husband testified that despite having significantly altered his lifestyle since separating from Wife, e.g. he was staying with his stepdaughter and various friends rather than paying rent or house payments and had not gambled or taken a vacation, he was not able to meet his monthly expenses on his income alone.[77] Despite this uncontroverted testimony, the Trial Court found that "Husband is able to be self-supporting through appropriate employment based on his reasonable expenses."[78]

We disagree. In particular, we find that the following findings by the Trial Court were clearly erroneous:

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[74] *Id.* at 166, 168.
[75] *Id.* at 168.
[76] *Id.* at 196.
[77] *Id.* at 203.
[78] Trial Court Order at 10, § XII(D).

- The finding Husband didn't need to purchase a (relatively modest) three-bedroom home at a cost of approximately $1,800 per month, but that he could get by with a one-bedroom apartment that cost only $700.[79]
- The reduction in Husband's budgeted costs for home maintenance, electricity, heating, and water/sewer/garbage pickup because it found that he should live in an apartment rather than a house.[80]
- The finding that Husband's gross monthly income was $3,085.00 even though there was uncontroverted testimony that he would not be able to continue working as many overtime hours as he had for the previous few months.[81]
- The Trial Court's failure to account for Husband paying any taxes as part of his budget despite Husband having included pay stubs as exhibits that showed taxes being withheld.[82]

On remand, the Court should consider a reasonable, middle-class budget for Husband—one under which he is not confined to purchase only the "bare necessities." In

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[79] *Id.* at 6, § XI(J). Husband testified that based on his experience looking for a place to live, "700 bucks doesn't really get you anything. You can live in the slums for 700 bucks." Tr. at 197.
[80] *Id.* at §§ XI (K, M, N, and O).
[81] Tr. at 167, 264.
[82] *See* Husband's Exhibit 2.

particular, we hold that Husband does not have to live in a cheap one-bedroom apartment to have reasonable financial needs.

b. Wife's Financial Needs.

As we observed, the Court spent far less time on Wife's financial needs, and did not scrutinize her budget for "luxury" items. While Wife documented significant expenses, she acknowledged that the vehicle expenses (then $10,501 per month) would decrease because she would sell the vehicles once they were awarded to her.[83] Wife also noted that she had no retirement savings. But Wife continues to receive per-capita payments, and although there is no guarantee that the payments will continue forever, particularly at their current level, they will continue so long as the Community has a gaming enterprise.[84] As noted, at the time of trial, those payments exceeded $64,000 per month. So although Wife also had no retirement funds, the reality is that unless the Community were to cease its gaming enterprise (a possibility we view as being highly unlikely), she will not need any source of revenue other than per-capita payments.

On remand, the Trial Court should consider that Wife will have reduced vehicle payments from the budget she originally presented, and subject Wife's budget to the same scrutiny as Husband's when deciding what level of maintenance she can afford. We

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[83] Trial Court Order at 4, § X.

[84] *See* Gaming Revenue Allocation Amendments to Business Proceeds Distribution Ordinance, Ordinance No. 10-27-93-002 at § 14.5.

reiterate, however, that the court needn't ensure the parties' standards of living post-dissolution will be equal.

5. Any Other Appropriate Factors

Most of the Trial Court's analysis under this prong fits better under the financial-needs factor. The court noted that Wife was being awarded significant vehicle debt that Husband would not have to pay, and that Husband had the opportunity to make employer-matched contributions to a 401(k) plan while Wife had no guarantee of ongoing per-capita payments. While those findings are technically true, it's of little use to Husband to have an employer 401(k) match when he can't afford to contribute to the plan in the first place. And as we have said, the possibility that Wife's per-capita payments will cease completely is remote.[85]

Most notably in this section of its Order, the Trial Court found that "Wife has no real employment earning capacity, and nowhere near what Husband can earn at the present time with benefits."[86] This is another instance where adopting Wife's proposed findings has caused clear error. Wife is receiving well over $700,000 per year in per-capita payments. Even assuming Husband could continue earning overtime on each check, he is only earning

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[85] Further, if Wife's per-capita payments are significantly reduced or eliminated in the future, she can move the court to modify its maintenance award. *See* Code, Ch. III, § 6(b)(2)(i) (permitting modification of maintenance awards based on substantially increased or decreased earnings of a party).

[86] Trial Court Order at 10, § XII (E).

approximately $37,000 per year, or about 5% of what Wife earns. The fact that Wife might theoretically have difficulty obtaining a high-paying job because she too has been out of the workforce and has little training should not have affected the Court's maintenance analysis. Rather, the reality that Wife's income is *20 times* higher than Husband's, should have militated in favor of a higher and longer-term maintenance award.

C. Division of Property

To decide what the proper division of property in a marriage-dissolution action should be, the Code requires the Tribal Court to consider the same factors as for maintenance awards.[87] Fortunately, the parties were able to agree on many items. But for those items that were not subject to the parties' agreement, the Trial Court awarded them all to Wife, finding in each case that items purchased with Wife's per-capita payments were her separate property and could not be awarded to Husband.[88] This, Husband argues, was an error of law. Husband also contends on appeal that the Trial Court awarded Wife certain of Husband's separate property. We address those arguments in turn.

1. Treatment of Items Purchased with Per-Capita Payments

Throughout the Trial Court's property award, it continually references how it would be an invasion upon Wife's separate property to award Husband property that was

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[87] Code, Ch. III, § 5.

[88] *See, e.g.*, Trial Court Order at 11-16 (awarding vehicles).

purchased with her per-capita payments.[89] Although the Trial Court is correct that per-capita payments are the separate property of the member under the Code and *Welch*,[90] that does not mean that anything purchased with per-capita payments during the marriage is separate property. Just as we held in *Welch* that maintenance could be awarded out of per-capita payments, we hold that property purchased with a member's per-capita payments is marital property and can be awarded to the non-member spouse. Otherwise there would be a "serious injustice" in cases like this one where the parties' nearly sole source of income throughout the marriage was per-capita payments.[91] But while we disagree with the Trial Court's decision to award personal property to Wife because it was purchased with per-capita payments, we nonetheless find that the Trial Court did not abuse its discretion in its division of property.

2. Husband's Separate Property from the Shop

Husband contends that there are multiple items in the garage and shop that were awarded to Wife that are actually his separate property, including various tools that he received as gifts.[92] A review of the trial transcript indicates, however, that Husband was awarded all the items he identified as being his separate property, with the possible

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[89] *Id.* at 11-16. § XVI.
[90] 2 Shak. A.C. at 19.
[91] *Id.* (discussing how there would be a serious injustice against non-member spouses if per-capita payments could not be used to satisfy spousal maintenance).
[92] *See* Appellant's Br. at 36.

exception of some antique signs and license plates located outside the parties' garage,[93] which were not discussed in the Trial Court's Order. Given that Husband's testimony about these items was very vague and that he provided no exhibit listing the items he was requesting, we find that the Trial Court was within its discretion in not awarding these unidentified items to Husband.

3. Remainder of the Property Division was Equitable

We affirm the Trial Court's decision with respect to the remaining marital property. Although the Trial Court could have awarded additional vehicles to Husband even though they were purchased with per-capita payments, we find that the Trial Court had "an acceptable basis in fact and principle"[94] in awarding both the vehicles and their associated debts to Wife. It would be inequitable to award Husband the vehicles while Wife has to pay for them after the marriage has been dissolved. Her amount of debt also made it fair to award the remaining items the Trial Court awarded to her.

V. Conclusion

The determination of spousal maintenance, including the amount and the duration, is reversed and remanded for a new decision in light of this opinion. We affirm the Trial Court's division of property.

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[93] *Compare* Trial Court Order at 18, § XXII *with* Tr. at 317-325.
[94] *Scheisel*, 762 N.W.2d at 273 (internal quotation omitted).

SO ORDERED.

Dated: June 8, 2015

Judge John Jacobson

Judge Vanya Hogen Moline

Terry Mason Moore
Tribal Court Judge, *Pro Tem*

COURT OF APPEALS
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC INDIAN RESERVATION STATE OF MINNESOTA

Lori Stovern,

Appellant

vs. Court File No. CTAPPP 041-15

Adam Dedeker,

Appellee.

MEMORANDUM DECISION AND ORDER

A. Summary.

On August 15, 2014, the Trial Court granted summary judgment to Adam Dedeker ("Dedeker"), in the amount of $492,000, on his claim that Lori Stovern ("Stovern"), his mother, had unjustly enriched herself from his funds during a period that she was his state-appointed conservator. On the same date, the Trial Court denied Dedeker's claim for costs and disbursements, and dismissed Stovern's defenses and counterclaims based on fraud and duress. Thereafter, on December 16, 2014, the Trial Court granted the Dedeker's motion for summary judgment on Stovern's counterclaims for costs that she asserted she had incurred while serving as his conservator.

Stovern timely appealed both Trial Court orders, and after briefing we heard oral argument on April 29, 2015. Today we affirm the Trial Court in all respects.

B. Factual Background

Stovern served as Dedeker's conservator from July, 2000 through September, 2004, pursuant to orders from the courts of the State of Minnesota. At some point thereafter, when the legal restrictions of his conservatorship had been lifted, Dedeker came to believe that Stovern had misappropriated as much as 1.5 million dollars of his money. The parties disagree as to some of the events that then unfolded: in

affidavit testimony to the Trial Court, Dedeker asserted that, when confronted with his suspicions, Stovern admitted malfeasance; but Stovern denies that, and contends merely that she did not have documents reflecting the legitimate uses, including cash payments made directly to Dedeker, to which the funds in question had been put. But the parties agree that, after Dedeker had raised the issue, the two of them met with an employee of the Shakopee Mdewakanton Sioux Community ("the Community"), and apparently with the employee's assistance, reached a settlement. Under the settlement agreement, Dedeker released his $1.5 million claim, and Stovern agreed to pay him, over time, a total of $750,000, from regular deductions to be taken from the *per capita* payments made to her by the Community. A written agreement to that effect was drafted by an attorney who had represented both parties in the past.

The parties agree that each of them then signed that document, but apparently neither of them now has a signed copy. An unsigned agreement, which the parties agree is an accurate copy of the document they signed, was presented to the Trial Court, as was a jointly-signed letter from them to the Community's Chairman and Business Council asking that $3,000 be deducted from each Community *per capita* payment to Stovern, and paid to Dedeker, until a total of $750,000 had been paid.

For three years after the submission of that letter to the Community officials, the parties' arrangement held. Under it, a total of $258,000 was paid to Dedeker by Stovern.

Late in 2013, however, at Stovern's direction, the deductions ceased; and in March, 2014, Dedeker filed a breach of contract action in the Trial Court.

Before the Trial Court, Stovern defended her action, and counterclaimed both for repayment of the $258,000 which Dedeker received, and for reimbursement of costs and fees that she contends she experienced during the period that she was his conservator, arguing that that she signed the settlement agreement while she was under duress, and that her signature was procured by fraud. Specifically, she asserted that before she signed the settlement agreement Dedeker had told her that if she did not settle with him he would bring criminal charges against her. She asserted to the Trial Court that she believed he could and would do so, and that she felt she had no choice but to sign. His statement, she says, and her belief, was that Dedeker himself could prosecute her, when of course the legal reality was that the most Dedeker could have done is file a complaint with appropriate authorities and hope that a prosecutor would initiate criminal proceedings.

In August, 2014, the Trial Court granted Dedeker's motion for summary judgment on his contract claim. The Trial Court analyzed Stovern's submissions and arguments in the light most favorable to her, and concluded that even if she could prove that Dedeker indeed had asserted he could and would prosecute her (which Dedeker denies), and if she could prove that he knew that the assertion was false and that he intended Stovern to rely upon his false assertion, and assuming that she actually did rely upon the false assertion -- even if all those things could be established at trial – the Trial Court noted

that Stovern could at any time have consulted with legal counsel concerning her options and her position, but instead signed the agreement, and then complied with it for several years. On that basis, the Trial Court concluded that her asserted belief was objectively unreasonable and therefore that no legal claim, either of fraud or duress, could properly be based upon it. .

Thereafter, in December, 2014, the Trial Court granted Dedeker's for summary judgment with respect to Stovern's counterclaim concerning expenses she claims she incurred on his behalf during the period from 2000 through 2004. The Trial Court held that although the Community has not adopted an applicable statute of limitations, still at this late date, more than ten years after the claim would have arisen, the doctrine of laches must, as a matter of law, bar Stovern's claims.

This appeal, from both Trial Court decisions, followed.

C. Standard of Review.

Under Rule 28 of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux Community, a grant of summary judgment is appropriate only when there are no genuine issues of material fact in dispute, and when the movant is entitled to judgment as a matter of law. Summary judgment should be granted only if, taking the record as a whole, and viewing the evidence in the light most favorable to the non-moving party, the Trial Court could not rationally find for the non-moving party. Anderson v. Performance Construction, LLC., 6 Shak. T.C. 42, at 46 (Aug. 9, 2013). But, in resisting a summary judgment motion a responding party must present enough evidence to show that there indeed is a genuine issue of material fact. Merely offering a scintilla of evidence, or creating some "metaphysical doubt" will not suffice. Little Six, Inc. v. Prescott and Johnson, 1 Shak. A.C. 157 (Feb. 1, 2000). The evidence must be such that it would permit the court, at trial, to find in the non-moving party's favor. Id.

On appeal, we review a grant of summary judgment as a question of law that is reviewed *de novo*. Id.

D. Analysis.

In her appeal, Stovern makes four arguments. First, she argues that there is a genuine issue of material fact as to whether the parties entered into a binding settlement agreement because there is no copy of the actual signed agreement. Appellant's Br. 2. Second, she argues that there is an issue of fact as to whether it was reasonable for her to believe that her son could criminally prosecute her if she did not enter into the settlement agreement, Id. at 3, and she asserts that she could prove the other necessary elements of a fraud or duress claim at trial. Id. at 4–5. Third, she maintains that the Trial Court looked to inadmissible evidence, specifically affidavits of a Community social worker and of the attorney who

drafted the settlement agreement, Id. at 5–6, despite the fact that the Trial Court expressly said that it was declining to consider those documents. And finally, she argues that her counterclaim for expenses incurred during the time she was Dedeker's conservator cannot be barred by laches because she was ignorant of the law, and because the Shakopee Community has not adopted an applicable statute of limitations. Id. at 7–8.

Having carefully considered these arguments we find none of them persuasive.

We think there is no dispute with respect to the existence and the essential terms of the parties settlement agreement. During oral argument on Dedeker's summary judgment motion, these colloquies occurred:

> THE COURT: Well, let me ask you this, because it's not clear to me either from the brief or from Ms. Stovern's affidavit. Does Ms. Stovern dispute that she signed a settlement agreement?
>
> MR. McGEE: No.
>
> June 11, 2014 Transcript, AT 14:17-21
>
> . . .
>
> THE COURT: Does Ms. Stovern dispute that she signed that letter to the business counsel [sic]?
>
> MR. McGEE: She does not.
>
> THE COURT: And does she dispute its accuracy in describing the settlement?
>
> MR. McGEE: Not to the essential terms ...
>
> Id., at 17:3-9.

The parties agree that Dedeker believed he was owed a sum of money; they agree that they reached a settlement of that claim; and they agree that the "essential terms" of that settlement obliged Stovern to pay him three thousand dollars from each of her *per capita* payments from the Community. Hence, there was the consideration that is necessary for the formation of a contract: Dedeker's agreement that he would forbear from seeking additional payments from Stovern. And in light of the parties' letter to the Community officials, the terms of their contract – that is, the amount that must be paid, the term within which it will be paid, and the source from which it is to be paid – can be ascertained. Under these circumstances, and given the fact that Stovern did perform under those "essential terms" for a period of years, the Trial Court properly concluded that there is no issue of material fact with respect to the formation and terms of the parties settlement agreement, and therefore that summary judgment clearly was appropriate as to that question.

Nor do we think things stand differently with respect to Stovern's claim that she entered into the agreement because Dedeker allegedly committed a fraud upon her, or because she was under undue

duress when she signed the agreement. A misrepresentation of law does not create a cause of action for fraud unless the person making the misrepresentation is either (1) learned in the field, such as a lawyer or an insurance claims adjuster, or (2) has a fiduciary duty or similar relationship of trust and confidence to the defrauded person. Northernaire Prods., Inc. v. Crow Wing Cnty., 244 N.W.2d 279, 280 (Minn. 1976); Stark v. Equitable Life Assur. Soc. of U.S., 285 N.W. 466, 469 (Minn. 1939). The simple justification for this rule is that "[o]rdinary vigilance will disclose the truth or falsehood of representations as to matters of law." State v. Edwards, 227 N.W. 495, 495 (Minn. 1929).

A statement of mixed fact and law can create a basis for a claim of fraud if it "'amounts to an implied assertion that facts exist that justify the conclusion of law which is expressed' and the other party would ordinarily have no knowledge of the facts." Hoyt Props., Inc. v. Prod. Res. Grp., *L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007) (quoting Miller v. Osterlund, 191 N.W. 919, 919 (Minn. 1923)). Examples of predominantly factual statements include the statement that one mortgage has priority over another, that a particular corporation has a right to do business in a state, *id.* (citing Restatement (Second) of Torts § 545 (1977)) or that a piece of land is free from a statutory reservation of minerals. Pieh v. Flitton, 211 N.W. 964, 965 (Minn. 1927). In these scenarios, the fraudulent misrepresentation is not the existence of a particular law, but the fact that one has complied with the requirements imposed by that law. The distinction is that "pure representations of law can be investigated by either party simply by reference to legal authority that is a matter of public record rather than requiring knowledge of information in the other party's possession." Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co., 732 F.3d 755, 760 (7th Cir. 2013) (applying Minnesota law).

But if Dedeker in fact did threaten to "prosecute" Stovern, his statement would be a simple misrepresentation of law – since one individual cannot criminally prosecute another – and therefore not actionable as fraud. If the threat was meant to refer to a civil lawsuit, the question of whether Dedeker had a valid cause of action would have been more of a mixed question of fact and law; but Dedeker possessed no facts relevant to such a lawsuit that were not also possessed by Stovern, and both parties had equal access to the applicable law and to lawyers. *See* Miller, 191 N.W. at 919 ("A misrepresentation of a matter of law . . . is not a representation on which the party to whom it has been made has a right to rely, for the law is presumed to be equally within the knowledge of both parties."); *see also* Edwards, 227 N.W. at 495. Clearly, settlements would have little meaning if they were voidable simply on the basis that one of the parties later came to question the merits of a threatened lawsuit.

Hence, even if Stovern were able to convince the Trial Court that Dedeker in fact did threaten to "prosecute" her, that would not be a material fact permitting the Court to find in Stovern's favor. Mr. Dedeker is not learned in the law, nor was he Ms. Stovern's fiduciary. To the contrary, Mr. Dedeker was allegedly threatening to prosecute or sue Ms. Stovern, and she claims that during the conservatorship he

attempted to hide money from his ex-wife. "Receiving repeated assurances from one who is believed to be dishonest provides no comfort and serves as an inadequate basis for any justifiable reliance." Burns v. Valene, 214 N.W.2d 686, 690 (Minn. 1974). Therefore, the circumstances that surrounded the alleged threats further weaken Stovern's argument for reasonable reliance.

As with fraud, so with duress. In order to successfully challenge a contract on the basis that it was formed under impermissible duress, a party must prove that he or she involuntarily executed the agreement because circumstances permitted no other alternative, and that those circumstances were the result of coercive acts by the other party. Oskey Gasoline & Oil Co., Inc. v. Continental Oil Co., 534 F.2d 1281 (8th Cir. 1976). Here, if indeed Dedeker threatened criminal prosecution, Stovern had several obvious choices available to her other than simply negotiating and signing the agreement. Most obviously, she could have consulted with legal counsel, as she had with respect to other matters in the past. We agree with the Trial Court that "[i]f all a contracting party had to do to assert a triable defense of duress was claim a misunderstanding of the law, or of existing facts, to relieve themselves of their duties, duress would be an issue in nearly every breach-of-contract case". Dedeker v. Stovern, SMSC Court File No. 785-14 (Aug. 15, 2014, at 10).

Nor is there any basis in the record for crediting Stovern's claim that the Trial Court impermissibly or inappropriately relied upon the affidavit of the Community employee whom the parties consulted before entering their agreement, and/or the affidavit of the attorney who drafted the agreement. The Trial Court expressly stated that it gave no weight to either affidavit, Id. at 3 – 4, n. 3 and n. 8, and nothing in the record suggests otherwise.

Finally, we affirm the Trial Court's conclusion that Stovern's claims for monies she allegedly paid for Dedeker's benefit during the years from 2000 to 2004 are time-barred. In doing so, we do not reach the question of whether Public Law 280, 28 U.S.C. §1360(a) (2012), imposes Minnesota's statute of limitations upon civil contracts between members of the Community. Instead, although we note Minnesota's statute in our discussion below, we conclude that whether or not any statute of limitations applies, under the facts here the equitable doctrine of laches clearly bars Stovern's claim.

Stovern argues that there are factual issues that should have precluded summary judgment on the laches defense, and it is true that laches can involve a fact-intensive inquiry. But such inquiry often is resolved on summary judgment when there are no genuine issues of material fact regarding the elements of the laches defense. 10B Charles Alan Wright et al., *Federal Practice and Procedure* § 2734 (3d ed.); *see also* Baskin v. Tennessee Val. Auth., 382 F. Supp. 641, 646 (M.D. Tenn. 1974) (citing decisions of several jurisdictions), *aff'd.*, 519 F.2d 1402 (6th Cir. 1975).

The party asserting the laches defense has the burden of establishing three things: (1) an unjustifiable delay in bringing a claim, (2) a lack of excuse for the delay, and (3) resulting evidentiary or

economic prejudice to the party against whom the claim has been made. Apotex, Inc. v. UCB, Inc., 970 F. Supp. 2d 1297, 1336 (S.D. Fla. 2013), 0*aff'd*, 763 F.3d 1354 (Fed. Cir. 2014); *see also* Martin v. Dicklich, 823 N.W.2d 336, 341 (Minn. 2012).

But a finding of laches is fundamentally based on the equities of a particular case. A trial court can make its ultimate determination notwithstanding the establishment of these three elements. Rather, the elements of laches lay the groundwork for the trial court's ultimate finding based on the equities. A.C. Aukerman Co. v. R.L. Chaides Const. Co., 960 F.2d 1020, 1036 (Fed. Cir. 1992) ("Laches is not *established* by undue delay and prejudice. Those factors merely lay the foundation for the trial court's exercise of discretion."). Because the doctrine of laches is so heavily founded on equities, a trial court is entitled to a great deal of discretion upon appellate review. Roederer v. J. Garcia Carrion, S.A., 569 F.3d 855, 858 (8th Cir. 2009) ("The determination of whether laches applies in the present case was a matter within the sound discretion of the district court, and we, accordingly, review the district court's application of laches for an abuse of discretion." (quoting Brown–Mitchell v. Kansas City Power & Light Co., 267 F.3d 825, 827 (8th Cir.2001)); Jackel v. Brower, 668 N.W.2d 685, 690 (Minn. Ct. App. 2003) ("[E]ven at summary judgment, the decision whether to apply laches lies within the district court's discretion and will be reversed only for an abuse of that discretion.").

Although delay is a component of laches, "it is generally agreed that delay alone does not constitute laches." 27A Am. Jur. 2d *Equity* § 129 (2015); *see also* Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., 108 F.2d 302, 305 (8th Cir. 1940) ("it has been repeatedly held that mere lapse of time does not constitute laches."). But the United States Court of Appeals for the Eighth Circuit has held that an analogous statute of limitations may indicate that commencement of an action was unreasonably delayed. Reynolds v. Heartland Transp., 849 F.2d 1074, 1075–76 (8th Cir. 1988) ("[T]he period prescribed in an analogous statute of limitation is a rough rule of thumb in considering the question of laches, and constitutes a pertinent factor in evaluating the equities."); Minn. Mining & Mfg. Co. v. Beautone Specialties, Co., 82 F. Supp. 2d 997, 1004 (D. Minn. 2000) (finding that delay almost twice as long as the most applicable state statute of limitations was "strong evidence" that delay was unreasonable). Thus, in our view it is not inappropriate to note that Ms. Stovern's ten-year delay far exceeds the six-year statute of limitations that would have been imposed upon her had she brought her case in the courts of the State of Minnesota. Minn. Stat. § 541.05, subdiv. 1.

But although delay is a critical element of a laches defense, the reasonableness of the delay is a more important component of the analysis. Ms. Stovern correctly points out that some of the cases cited by the Trial Court did not specifically involve laches. *See* Albino v. Baca, 697 F.3d 1023, 1026 (9th Cir. 2012) (exhaustion of administrative remedies); Fisher v. Johnson, 174 F.3d 710, 711 (5th Cir. 1999) (statute of limitations); Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, 763 N.W.2d 250, 264

(Iowa 2009) (failure to comply with statutory obligations). However, there is ample case law that establishes precisely the same principle in the context of laches. *See, e.g.*, Jeffries v. Chicago Transit Auth., 770 F.2d 676, 680 (7th Cir. 1985); Baskin v. Tennessee Val. Auth., 382 F. Supp. 641, 646 (M.D. Tenn. 1974) ("Plaintiffs' assertion that they were ignorant of their legal right to maintain an action in court for reinstatement is an insufficient defense to the charge oflaches."), *aff'd*, 519 F.2d 1402 (6th Cir. 1975); Marrero Morales v. Bull Steamship Co., 279 F.2d 299, 301 (1st Cir. 1960) ("[M]any cases have held that ignorance of one's legal rights does not excuse a failure to institute suit.").

In addition to the length of delay, and the reasonableness or unreasonableness of delay, the question of prejudice is of enormous importance in considering whether laches bars a claim. Factors that tend to establish evidentiary prejudice include the death of witnesses, the fading of witness' memories, and the destruction or loss of documents. *See, e.g.*, Serdarevic v. Advanced Med. Optics, Inc., 532 F.3d 1352, 1360 (Fed. Cir. 2008); Apotex, Inc. v. UCB, Inc., 970 F. Supp. 2d 1297, 1336 (S.D. Fla. 2013), *aff'd*, 763 F.3d 1354 (Fed. Cir. 2014); Adair v. Hustace, 640 P.2d 294, 300 (Haw. 1982). Here, the parties do not dispute that there now is apparently no documentation available regarding the accounting of conservatorship fees, so the principal evidence available is witness testimony, and one witness is deceased. Dedeker v. Stovern, SMSC Court File No. 785-14 (Dec. 16, 2014, at 12)(citing Dedeker's Mem. in Supp. of Second Mot. for Summ. J. at 6). And the memory of all other witnesses is over ten years old.

Taking all these factors together, we hold that Stovern's delay in asserting her claims -when she clearly could have done so at least in the context of the negotiations that led to the parties' settlement agreement, or at any time earlier -as a matter of law bars the assertion of the claims now, and the Trial Court properly awarded summary judgment to Dedeker on that question.

For all the foregoing reasons, thejudgment of the Trial Court is, in its entirety, AFFIRMED.

Dated: July 27, 2015

Judge John E. Jacobson

Judge Henry M. Buffalo, Jr.

Judge Terry Mason Moore

COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

In Re the Estate of Clarence Enyart,

Decedent

App. Court File: 042-15

Opinion and Order

Before BUFFALO, HOGEN MOLINE, and MASON MOORE, Appellate Judges.

I. Introduction

This case concerns the estate of Clarence Enyart, who died on August 12, 2013. Nine years before his passing, Mr. Enyart relinquished his reservation land assignment to his daughter, Tracy Lanham (f/k/a Tracy Green). But in his 2011 will, he attempted to transfer that same land assignment to his son, Paul Enyart. The Trial Court ruled that the land assignment was not part of Clarence Enyart's estate, and that Paul Enyart was not entitled to either the land assignment or any compensation therefor upon his father's death. Paul Enyart appealed, and we affirm.

II. Issues on Appeal

Paul Enyart's appeal raises three issues:

1. Did Clarence Enyart effectively transfer his land assignment to Tracy Lanham in 2004?

   We affirm the Trial Court's decision that he did.

2. Should the Trial Court have permitted Paul Enyart to conduct more discovery on whether Clarence Enyart relinquished his land assignment subject to any conditions?

   We find that the Trial Court did not abuse its discretion by denying further time to conduct discovery on this issue.

3. Should the Trial Court have applied the rule against ademption by extinction to the land assignment?

   We hold that the rule did not apply to the facts presented in this case.

III. Factual Background

Sometime before the fall of 2004, Clarence Enyart obtained a Residential Land Lease to the residence located at 3157 Sweetgrass Circle in Prior Lake on the Community's Reservation.[1] In 2004, he relinquished his land assignment to his daughter, Tracy Lanham, under the Community's Consolidated Land Management Ordinance.[2] The Community General Council confirmed the re-assignment of the land to Tracy Lanham in General Council Resolution No. 9-14-04-013.[3] The record does not reflect that anyone challenged this re-assignment.

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[1] Brief of Estate of Tracy Lanham ("Lanham Brief") at 1.
[2] Transcript of December 18, 2014 Hearing ("Dec. 18, 2014 Tr.") at 9-10.
[3] *Id.*

Tracy Lanham moved into the residence in the fall of 2004 with her two children, Brock and Brandon Lanham.[4] She continued to reside there until her death in September 2014.[5]

As noted above, Clarence Enyart died on August 12, 2013. In Section 2.1 of his Last Will and Testament, Mr. Enyart declared:

> Subject to Shakopee Mdewakanton Sioux Community law, I prefer that my land assignment and home site be offered to my son, Paul L. Enyart, should he survive me. Should Paul L. Enyart decline to take possession of my land assignment and home site, I prefer that my land assignment and home site be "re-couped" by the Shakopee Mdewakanton Sioux Community and that the proceeds of such recoupment be distributed in accordance with Article Three of this will.[6]

In his affidavit to the Trial Court, Paul Enyart stated his belief that his father had conditionally given his land assignment to Tracy Lanham, subject to a signed agreement that she build Clarence Enyart an apartment within the residence.[7] Under this alleged agreement, if Ms. Lanham failed to maintain an apartment for Clarence Enyart within the Sweetgrass Circle residence, the land assignment would revert back to Clarence Enyart.[8] Paul Enyart did not produce a copy of any such agreement.

In October 2013, Judge Jacobson directed that Clarence's estate be administered. During a probate hearing on November 18, 2014, Paul Enyart brought Section 2.1 of the

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[4] Lanham Brief at 2.
[5] *Id.*
[6] Last Will and Testament of Clarence W. Enyart, Tr. Ct. Dkt. 6 (the "Will") at § 2.1.
[7] Affidavit of Paul Enyart, Tr. Ct. Dkt. 18, at ¶ 4.
[8] *Id.*

Will to the Trial Court's attention, and raised the issue of whether the land assignment should be included in Clarence Enyart's estate.[9] At that same hearing, counsel for the personal representatives of the estate noted that "we contacted the tribal attorney multiple times and have been told multiple times over the couple years that the land assignment was Tracy Lanham's, it was not Clarence Enyart's."[10] Nonetheless, Paul Enyart requested that the court order formal discovery on whether the land assignment was subject to a condition that Tracy Lanham maintain an apartment in the home for Clarence Enyart.[11]

Rather than order formal discovery, Judge Jacobson suggested that Paul Enyart write a letter to the Community's legal counsel to request further information about the land assignment,[12] which he did shortly after the hearing.[13] In response, counsel for the Community informed the Clerk of Court that the Community would provide the court with a copy of Community General Council Resolution 09-14-04-13, titled "Approving Relinquishment of Land Assignment from Clarence Enyart to Tracy Green."[14]

At the final probate hearing of December 18, 2014, the Community's counsel showed a copy of Resolution 09-14-04-13 to the Trial Court and the parties and counsel

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[9] Transcript of November 18, 2014 Hearing ("Nov. 18, 2014 Tr.") at 8.
[10] *Id.* at 7.
[11] *Id.* at 13.
[12] *Id.*
[13] *See* Dec. 10, 2014 Letter from L. Leventhal to W. Hardacker, Tr. Ct. Dkt. 17.
[14] *See* Dec. 16, 2014 Letter from Attorney Hardacker to SMSC Clerk of Court, Tr. Ct. Dkt. 20 (the "Hardacker Letter").

present at the hearing, including counsel for the personal representatives of the estate, for Ms. Lanham's children, and for Paul Enyart.[15] According to the Trial Court, the resolution stated that Clarence Enyart had relinquished his land assignment to his daughter, Tracy Lanham, and that the General Council had approved the relinquishment.[16] The Resolution contained no contingency under which the assignment would revert to Clarence Enyart.[17] After viewing Resolution 09-14-04-13, Judge Jacobson held that Clarence Enyart relinquished the Sweetgrass Circle land assignment in 2004, so that it was not part of his estate at the time he executed his will or at his death in August 2013.[18]

IV. Legal Analysis

A. The Status of the Land Assignment

In 2002, the Shakopee Mdewakanton Sioux Community General Council enacted the Consolidated Land Management Ordinance (the "Ordinance") by General Council Resolution No. 06-28-02-005, and the Secretary of the Interior approved it on July 29,

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[15] Dec. 18, 2014 Tr. at 9.
[16] *Id.*
[17] *Id.* at 9-10.
[18] *Id.* at 16.

2002. The Ordinance established a comprehensive system for the allocation and transfer of land assignments.[19]

Under the definition of "assignment" in the Ordinance, a recipient of a land assignment does not receive any additional interest in the land, apart from eligibility to "receive a residential lease."[20] Indeed, Section 3.8 of the Ordinance confirms that "[r]eceipt of a land assignment does not convey any property interests in the assigned parcel of land. An assignment cannot be encumbered, conveyed, nor sublet by any person."[21] A residential land lease does not confer ownership rights to a parcel of land. Rather, a residential land lease is a "legal instrument . . . that grants a leasehold interest for residential purposes after assignment of a residential parcel."[22] The recipient of a residential land lease therefore only possesses a possessory interest in the assigned property.[23]

The General Council holds the sole authority to assign land or to convey any interest in a land assignment.[24] The Business Council may assign land parcels to eligible persons under Chapters 3 and 4 of the Ordinance. But when a holder of a land

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[19] The status of a land assignment is a legal question, which we review *de novo*. *See, e.g. Stopp v. Little Six*, 1 Shak. A.C. 23 (Jan. 29, 1996); *Welch v. SMS(D)C*, 1 Shak. A.C. 35 (Oct. 14, 1996) (plurality opinion).

[20] Ordinance at § 1.3(A).

[21] Ordinance at § 3.8.

[22] *Id.* at §1(H).

[23] *See* Black's Law Dictionary 909 (8th ed. 2004) (defining "leasehold" as a "tenant's possessory estate in land or premises . . ..").

[24] *See* Ordinance at § 2.1.

assignment dies, any proposed transfer of the *use* interest is subject to Community government approval, as provided in the Ordinance and governed by Community law.[25]

Paul Enyart argues that at the time of the execution of Clarence Enyart's will, Clarence was in possession of all interests associated with the assignment.[26] But the only property interest ever available to Clarence Enyart was a residential leasehold. Even if he had held a possessory interest in the land assignment at the time of his death, all proposed transfers of interest are subject to Community government approval.[27] Throughout the proceedings before Judge Jacobson, Paul Enyart did not present any evidence that the Community approved any land assignment transfer from Clarence to Paul. Rather, the record reflects that Clarence Enyart did not have a leasehold interest in the land assignment at the time of his death because he had relinquished it to his daughter several years earlier. And nothing in the record reflects that Clarence Enyart had attempted to enforce the alleged conditions on the transfer of the assignment to Tracy Lanham before his death.

Chapter 4 of the Ordinance provides procedures for an *inter vivos* relinquishment of a land assignment by an enrolled tribal member. Under Section 4.14 of the

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[25] *Id.* at § 4.12.1

[26] Brief of Paul Enyart ("Enyart Brief") at 12-13.

[27] Indeed, Mr. Enyart recognized as much in his will when he bequeathed his land assignment to Paul Enyart "[s]ubject to Shakopee Mdewakanton Sioux law." Will at § 2.1.

Ordinance, a member can voluntarily relinquish his or her land assignment for reassignment and lease to another enrolled member or to the Community. But doing so terminates the prior holder's residential land lease.[28]

In the present case, Clarence Enyart requested that his land assignment be transferred to his daughter Tracy Lanham.[29] The Community approved this land-assignment transfer in General Council Resolution No. 9-14-04-013.[30] Nothing in that document nor in any other evidence presented to the court indicated that the Community's approval of the land assignment transfer was subject to any conditions.

In fact, the land assignment was transferred to Tracy Lanham and she lived there for nearly ten years before Clarence Enyart's death. We agree that Clarence Enyart did not have any property interests in the land assignment to give to Paul at the time of his death, and affirm the Trial Court's ruling to that effect.

B. Additional Discovery

Paul Enyart doesn't really contend that—based on the evidence before it—the Trial Court was wrong to exclude the land assignment from Clarence Enyart's estate. Instead, his real argument is that the Tribal Court should have been permitted him to further explore his contention that his father *conditioned* relinquishment of the land

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[28] *Id.* at § 4.10.
[29] Dec. 18, 2014 Tr. at 9-10.
[30] *Id.* at 10.

assignment to Tracy Lanham on her providing an apartment on the property for him, and that Ms. Lanham violated that condition.

Whether to allow discovery and to what extent is within the Trial Court's discretion. And because a trial court has broad discretion to manage discovery of a pending proceeding, we review the issue of whether the Trial Court should have permitted additional discovery for abuse of discretion.[31]

In General Council Resolution 05-12-98-002, the Community authorized the Tribal Court to use the Uniform Probate Code ("UPC") to decide probate matters. Under section 1-304 of the UPC, the Federal Rules of Civil Procedure govern probate proceedings, and under Federal Rule 26(b), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Even so, discovery is subject to Rule 26(b)(2)(C), which permits a trial court to limit the "frequency or extent of discovery" on motion or on its own, if:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

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[31] *See Wiggin v. Apple Valley Med. Clinic, Ltd.*, 459 N.W.2d 918, 919 (Minn. 1990) (citing *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987) ("[W]e will not disturb a trial court's decision regarding discovery absent a clear abuse of discretion")); *In re Hardieplank Fiber Cement Siding Litig.*, No. 12-MD-2539, 2014 WL 5654318, at *1 (D. Minn. Jan. 28, 2014) ("A decision regarding the scope of discovery is a procedural matter, reviewed for abuse of discretion.").

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

The Trial Court didn't explicitly weigh those factors in its decision to deny further discovery in this case, but we nonetheless find that the court did not abuse its discretion by denying further discovery. As we have discussed, the Trial Court encouraged Paul Enyart to engage in informal discovery to obtain records of the Community regarding the land assignment because the Community was not party to the probate proceedings and enjoys immunity from suit.[32] He granted additional time to probate the estate to permit this informal discovery, even though the estate's personal representative was a Community employee who had served as Clarence Enyart's conservator of estate before Mr. Enyart's death and had represented to the Court that all the records he had seen regarding the land assignment—having asked for the records "multiple times over the years"—showed that Mr. Enyart unconditionally relinquished his land assignment to Tracy Lanham in 2004.

Further, after the Community presented the General Council resolution to the parties and the Trial Court confirming the unconditional assignment from Clarence Enyart to Tracy Lanham, what Paul Enyart actually asked the Trial Court to do was

[32] *See supra* at 4.

allow more time so he could petition the Community's *Business Council* for relief regarding the land assignment:

> Mr. Leventhal: [I]t is specifically provided in the land code that determinations by General Council -- excuse me, by the Business Council can be made after death. I would make reference to 4.12.4, posthumous transfer of land assignment. And so that would be in the ability of the General Council -- of the Business Council.[33]

Judge Jacobson agreed that any relief regarding the land assignment would have to come from the Community's other branches of government:

> Judge Jacobson: I take your point, Mr. Leventhal, with respect to the powers of the Business Council and ultimately the General Council with respect to land assignments and, and the -- the imposing or requiring of compliance with laws and equitable considerations. *But this Court doesn't have that role.*
>
> In the, under the Consolidated Land Ordinance, when we're looking at the section, I cited Section 4 4.10 speaks only of the Business Council and the General Council. And looking again at the sections that are relevant to this relinquishment, this particular relinquishment, it seems to me or it seems clear to me that the relinquishment, when it is approved by the General Council, it is effective immediately. And Section 4.14.1 notes in its final sentence the decisions of the General Council on any request under this paragraph is final.
>
> So it seems to me that the estate is correct, the land assignment is not properly part of the estate and therefore is not, would not properly be included in the inventory. If your client believes, as he clearly does, that there should be effect given to Mr. Clarence Enyart's request in Article 2 Section 2.1 of his will, it seems to me that that case should be made to the Business Council.[34]

[3333] Dec. 18, 2014 Tr. at 12.

[34] *Id.* at 15-16 (emphasis added).

Particularly in light of Paul Enyart's admission that the Business Council—and not the Court—would have to act on the land assignment, it was reasonable for the Trial Court to deny further discovery so that the estate could be probated. Delaying the process so that Paul Enyart could seek political relief would have complicated the probate process for both Clarence Enyart and Tracy Lanham. Based on the facts presented to him, Judge Jacobson reasonably determined that any benefit derived from further discovery was outweighed by the burden of continuing discovery, and we find that he did not abuse his discretion.

C. Rule Against Ademption by Extinction

Enyart additionally argues that even if the land assignment itself cannot be transferred to him, he is entitled to any proceeds from a past or future sale of the property based on the non-ademption doctrine of the Uniform Probate Code.[35] Whether the doctrine applies is a question of law, which we review *de novo*.[36]

In support of this argument, Enyart cites *Estate of Tracy L. Stade-Rapasky*.[37] In that case, the decedent Community member had devised her land assignment to her granddaughter, who was a minor at the time of the member's death. The Court held

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[35] Enyart Brief at 13.

[3636] *See, e.g. Stopp v. Little Six*, 1 Shak. A.C. 23 (Jan. 29, 1996); *Welch v. SMS(D)C*, 1 Shak. A.C. 35 (Oct. 14, 1996) (plurality opinion).

[37] 6 Shak T.C. 111 (June 28, 2012).

that, under the Ordinance, only adult Community members could hold land assignments,[38] so the land assignment was not part of the estate.[39]

Under the doctrine of "ademption by extinction," when an individual devises property in his will, and the individual no longer owns that property at the time of his death, the devised property is considered adeemed and the gift is considered void.[40] The Court in *Estate of Tracy L. Stade-Rapasky* cited Section 2-606 of the UPC as an equitable doctrine to overcome the harsh effects of ademption. Under the UPC, a pecuniary award to a devisee may be permitted "to the extent it is established that ademption would be inconsistent with the testator's manifested plan of distribution."[41] The *Stade-Rapasky* Court thus held that, because the decedent did not intend the property to be adeemed, the minor granddaughter was entitled to receive net proceeds from the sale of the land assignment and the home.[42]

The present case is, however, distinguishable from *Estate of Stade-Rapasky*. In the *Stade-Rapasky* case, the problem with the testamentary land-assignment gift was that as a matter of tribal law, it could not pass to a minor. Here, the problem is that, at the time Mr. Enyart purported to devise the land assignment to his son Paul, he had already relinquished it without qualification to his daughter Tracy Lanham seven years earlier.

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[38] *Id.* at 116.
[39] *Id.* at 118.
[40] *Id.* at 116 (citing James A. Casner & Jeffrey N. Pennell, *Estate Planning*, Vol. 1, 3062 § 3.2.5.2 (7th ed. 2006)).
[41] UPC § 2-606(a)(6).
[42] *Estate of Stade-Rapasky*, 6 T.C. at 118.

Once the General Council approved the relinquishment of his land assignment to Tracy Lanham in 2004, Clarence Enyart simply did not have the land assignment to bequeath or otherwise to anyone in his 2011 Will, and so the land assignment does not fit the doctrine of ademption or the UPC rule avoiding it. Were it otherwise, testators could create rights in property they didn't own simply by including devises to it in their wills.

V. Conclusion and Order

For all these reasons, we affirm the Trial Court's conclusion that Clarence Enyart legally transferred his land assignment to Tracy Lanham in 2004, find that Judge Jacobson's decision to deny further discovery on that issue was not an abuse of discretion, and affirm that ademption by extinction did not apply in this case. We AFFIRM the Trial Court's order settling the estate of Clarence Enyart.

SO ORDERED.

Dated: July 27, 2015

Judge Henry M. Buffalo, Jr.

Judge Vanya Hogen Moline

Pro Tem Judge Terry Mason Moore

COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

In Re Marriage of:
Cyndy Stade-Lieske,

Appellee/Petitioner,

v. App. Court File : 043-16

Joseph Stephen Lieske,

Appellant/Respondent.

Opinion and Order

Before JACOBSON, HOGEN, and MASON MOORE, Appellate Judges.

I. Introduction

This is the second appeal in the marriage-dissolution action between Joseph Stephen Lieske ("Husband") and Cyndy Stade, f/n/a Cyndy Stade-Lieske ("Wife"). The sole issue presented to this Court is whether the trial court abused its discretion by awarding Husband spousal maintenance in the amount of $1,500 per month for a period of 18 months. We hold that it did, and we reverse and remand to the court with specific instructions as outlined in this opinion.

II. Background

Wife is a member of the Community; Husband is not.[1] They married on June 25, 1996, and lived within the Community Reservation (the "Reservation") for the duration of their 18-year marriage.[2] They had no children together,[3] but Wife had four children from a previous marriage, all of whom lived with the parties for some time during the marriage.[4]

At the outset of the marriage, Husband held a couple of different jobs.[5] But early on, at Wife's request, Husband agreed to stop working, and he did not work for the balance of the marriage.[6] Wife owns and operates a few in-home businesses.[7] But the income derived from those businesses has been negligible.[8] Consequently, the parties relied almost exclusively on Wife's per-capita payments for financial support during their marriage.[9]

In addition to living expenses, the parties purchased a wide variety of vehicles, gambled, and travelled.[10] Wife also paid spousal maintenance to her previous husband

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[1] *Stade-Lieske v. Lieske*, No. 783-14, Transcript of Trial at 38, 148 ("Tr.").
[2] *Id.* at 13, 16, 26–27. The parties continue to live within the Reservation. *Id.* at 15–16.
[3] *Id.* at 41.
[4] *Id.* at 41, 112, 115–16.
[5] *Id.* at 170–72.
[6] *Id.*
[7] *See id.* at 18–20.
[8] *See id.* (noting gross annual income from businesses totaled $4,311).
[9] *Id.* at 22–25, 38.
[10] *Id.* at 37–38, 61–87, 116–17, 120–23, 175–76.

and provided Husband with an "allowance" for his discretionary use.[11] But the parties did not contribute to any retirement or investment accounts.[12]

During the marriage, Husband helped care for Wife's four children.[13] He also performed yard work and home maintenance, cleaned, and managed the household finances.[14] Wife also helped care for her children, contributed to the household upkeep, and volunteered with the Community.[15]

In March 2014, Wife petitioned the trial court to dissolve the parties' marriage, stating there had been an irretrievable breakdown in their relationship.[16] Since that time, Husband became a certified welder and obtained employment with Natural Light Fabric Structures ("Natural Light"), where he makes a standard hourly wage of $15 and overtime hourly wage of $22.50.[17] Natural Light also provides Husband with the following benefits: allowance for medical insurance; allowance for dental insurance; and 401(k) matching.[18] Wife continued to receive her per-capita payments, amounting

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[11] *Id.* at 26, 93–94, 105–06.
[12] *Id.* at 266.
[13] *Id.* at 172–73.
[14] *Id.* at 173.
[15] *Id.* at 41–42, 101–03.
[16] *Stade-Lieske v. Lieske*, No. 783-14, Petition at 2 (Mar. 7, 2014). Husband simultaneously petitioned for marriage-dissolution in Scott County District Court; but that court ultimately dismissed Husband's petition, deferring to the Community's court system. *Lieske v. Stade-Lieske*, No. 70-FA-14-3740, slip op. at 13–14 (Scott County, Minn. Nov. 17, 2014).
[17] *Id.* at 34, 165–66; *Stade-Lieske v. Lieske*, No. 783-14, Pet. Ex. 11 ("Pet. Ex.").
[18] Tr. at 168, 265–66.

to roughly $65,000 per month.[19] She also continued to earn around $550 per month from her in-home businesses.[20]

In August 2014, the court held a two-day trial.[21] Two months later, it ordered entry of judgment, dividing the parties' marital property and awarding Husband spousal maintenance in the amount of $1,000 per month for a period of 18 months.[22]

Husband appealed the court's order with respect to both property division and spousal maintenance.[23] We affirmed the court's division of marital property.[24] But we reserved the court's award of spousal maintenance and remanded with numerous instructions for the court's consideration.[25] On remand, the court awarded Husband spousal maintenance in the amount of $1,500 per month for a period of 18 months.[26] Husband now appeals the court's new award for spousal maintenance.[27]

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[19] Pet. Ex. 8.
[20] Pet. Exs. 6–7.
[21] Tr. at 1.
[22] *Stade-Lieske v. Lieske*, No. 783-14, Findings of Fact, Conclusions of Law, Order for Judgment, Judgment & Decree at 1, 10–18 (Oct. 23, 2014) ("*Order I*").
[23] *Stade-Lieske v. Lieske*, No. 783-14, Notice of Appeal (Nov. 21, 2014).
[24] *Stade-Lieske v. Lieske*, No. 040-14, slip op. at 22 (Jun. 8, 2015) ("*Appellate Opinion*").
[25] *Id.* at 8–22.
[26] *Stade-Lieske v. Lieske*, No. 783-14, Memorandum & Order at 8 (Jan. 28, 2016) ("*Order II*").
[27] *Stade-Lieske v. Lieske*, No. 783-14, Notice of Appeal (Feb. 23, 2016).

III. Analysis

We review a court's award of spousal maintenance for an abuse of discretion.[28] "To decide whether a trial court has abused its discretion with respect to a maintenance award, we review its findings of fact to see if they are clearly erroneous, and its conclusions of law *de novo*."[29] A court's findings of fact are clearly erroneous if they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole."[30] "Thus, we must accept the lower court's findings of fact unless upon review we are left with the definite and firm conviction that a mistake has been committed."[31]

A. Applicable Law

As an initial matter, we must note that following the court's second order for spousal maintenance, certain amendments to the Community's Domestic Relations Code (the "Code") took effect.[32] We must therefore decide whether to apply the previous version or amended version of the Code in this appeal. Generally, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result

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[28] *Welch v. Welch*, 2 Shak. A.C. 11, 17 (Apr. 15, 2009).
[29] *Appellate Opinion* at 7.
[30] *Brooks v. Corwin*, 2 Shak. A.C. 5, 6 (Aug. 4, 2008).
[31] *SMSC Gaming Enterprise v. Prescott*, 2 Shak. A.C. 1, 2 (Aug. 9, 2006).
[32] The court issued *Order II* on January 28, 2016. *Order II* at 1. The amendments to the Code went into effect on February 10, 2016. Letter from Charlie Vig, Chairman, Shakopee Mdewakanton Sioux Community to Diane K. Rosen, Regional Director, Bureau of Indian Affairs (Feb. 10, 2016).

in manifest injustice or there is statutory direction or legislative history to the contrary."[33]

Here, neither the amendments to the Code, nor the resolution in which they were adopted demonstrate a legislative intent for them to be prospective only.[34] However, the amendments to the Code are of such significance, that were we to apply them on this appeal, we would be compelled to remand this case and instruct the court to open the record for additional evidence, to issue additional findings, and to issue a new order. This case has been pending for nearly two and a half years and was tried almost one and a half years before the amended version of the Code became effective. The parties have poured significant resources into reaching a resolution, under the previous version of the Code. We believe that another remand would greatly increase the expense to the parties and further delay resolution in this case, which we deem manifestly unjust. We thus proceed under the former version of the Code.

B. Maintenance

Where parties have not entered into a valid antenuptial agreement or stipulation, the court may award spousal maintenance when it deems appropriate.[35] In determining the amount and duration of spousal maintenance,

> [t]he Tribal Court shall consider the length of the marriage; contributions, financial and non-financial, of both spouses; the standard of living to

[33] *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974).
[34] *See generally* General Council Resolution No. 11-10-15-002 (Nov. 10, 2015).
[35] Code, Ch. III, § 6.

> which each spouse has become accustomed; the financial needs of both spouses; and any other factor the Court finds appropriate. The Tribal Court shall not consider misconduct of either spouse when making its determination.[36]

1. Length of Marriage

The first consideration is the length of the parties' marriage.[37] In its January 2016 Order, the court determined that the length of the parties' marriage did not weigh in favor of permanent maintenance or in favor of greater maintenance.[38] In reaching this decision, the court reflected on Husband's ability to obtain employment immediately following initiation of this action and failure to demonstrate a need.[39] But by engaging in this analysis, the court conflated the length-of-marriage consideration with the financial-needs consideration.

As we said in our previous opinion, "the longer the marriage, the greater the chances that maintenance will be awarded, particularly where one spouse is out of the workforce during the entirety of the marriage."[40] Here, the parties were married for 18 years, and Husband remained out of the workforce for virtually the entirety of that time.[41] While it may be true that Husband gained skills working in his shop, he still

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[36] *Id.*
[37] Code, Ch. III, § 6.
[38] *Order II* at 1–2.
[39] *Id.*
[40] *Appellate Opinion* at 8–9.
[41] Tr. at 13, 170–72.

forewent any type of career development at the request of Wife.[42] He is now entering the workforce without the benefit of 18 years of career advancement. A spousal-maintenance award of $1,500 per month for a mere 18 months cannot offset Husband's foregone opportunity to work for 18 years.

Our position is supported by Minnesota common law. In *Nardini v. Nardini*, the Minnesota Supreme Court recognized that where a spouse has acted as a homemaker, a marriage-dissolution poses unique challenges.[43] The court noted that the spouse becomes deprived of an interest in the only source of income he or she has known, "and after foregoing the opportunity to carve out a separate business career which might survive a marriage dissolution, [he or] she is expected to abandon what [he or] she has known as a career as a homemaker and embark on some undefined new career."[44] Regardless of whether Husband can or cannot properly be deemed a homemaker, he remained outside of the workforce for 18 years, helped care of Wife's children, maintained the parties' home, and managed the parties' finances.[45] And during that time, he relied solely on Wife's per-capita payments.[46] Therefore, the principles upon which *Nardini* was decided apply equally in this case.

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[42] *Id.* at 170–72.
[43] 414 N.W.2d 184, 198 (Minn. 1987).
[44] *Id.*
[45] *See* Tr. at 13, 38, 170–73.
[46] *Id.* at 22–25, 38.

This consideration weighs heavily in favor of a higher and longer-term maintenance award. Given the potential raises that Husband has foregone over the 18-year marriage, we believe that at least $2,000 is necessary to mitigate the reduced income he is now achieving. This accounts for an assumed average annual pay raise of 3% with no promotions. We also believe that given the skills Husband has obtained during the marriage, nine years—or half of the marriage—should suffice for Husband to make up for his lost time in the workforce.

2. Financial and Non-financial Contributions

The General Council has determined that both financial and non-financial contributions to a marriage are relevant when awarding spousal maintenance.[47] In its January 2016 Order, the court made no clear indication of whether the parties' contributions to the marriage ultimately weighed in favor of spousal maintenance and the amount and duration thereof.[48] It noted that Wife made virtually all of the financial contributions, through her per-capita payments, which the court believed weighed in favor of no award of spousal maintenance.[49] But as we said in our prior opinion, while Wife was virtually the exclusive financial provider in the marriage, "the fact that she

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[47] Code, Ch. III, § 6.
[48] *See Order II* at 3–4.
[49] *Id.* at 4.

also requested Husband quit his job weighs in favor of awarding spousal maintenance."[50]

The court also noted that both parties made non-financial contributions to the marriage.[51] However, the court failed to explain how the parties' non-financial contributions—aside from Husband's time working in his shop—weighed in its award of spousal maintenance.[52] As we said in our prior opinion, the court must do more than make factual findings; it must apply those findings in its analysis.[53] Here, we note again that Husband made significant non-financial contributions to the marriage. He assisted with the care of Wife's four children, maintained the house, and managed the parties' finances.[54] These contributions added value to the parties' marriage, and they also weigh in favor of higher and longer-term spousal maintenance.

Finally, in its January 2016 Order, the court indicated that its finding that Husband was at fault for the parties not having investment and retirement accounts did not impact its decision. While we appreciate the court's clarification as to the impact of

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[50] *Appellate Opinion* at 12.
[51] *Order II* at 4.
[52] *See id.*
[53] *Appellate Opinion* at 12; *see also In re Civil Commitment of Spicer*, 853 N.W.2d 803, 811 (Minn. App. 2014) ("An order does not permit meaningful appellate review if it does not identify the facts that the district court has determined to be true *and the facts on which the district court's decision is based*." (emphasis added)).
[54] Tr. at 172–73.

its finding, we remain convinced that the court's finding was clearly erroneous.[55] As we stated in our previous opinion:

> [T]he record is clear that both parties spent a significant amount of Wife's per-capita payments during the marriage. They did a great deal of traveling, often to Disney World, which was Wife's preferred destination. And *both* spouses spent significant amounts on gambling, with Wife spending *hundreds of thousands* of dollars per year on gambling in 2010, 2011, 2012, and 2013.[56]

Given Wife's financial contributions to the marriage and Husband's non-financial contributions to the marriage, in light of Wife's request that Husband not work, this factor also weighs in favor of higher and longer-term maintenance.

3. Standard of Living

The third consideration for spousal maintenance is the parties' standard of living during the marriage.[57] In its January 2016 Order, the court took our previous opinion as a direction for it to "ascertain what a reasonable middle-class lifestyle [is]."[58] The court went on to review evidence submitted by Wife regarding what it means to be "middle class."[59]

The court's interpretation of our previous opinion is peculiar. We did not instruct the court to define a middle-class lifestyle. We stated:

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[55] *Appellate Opinion* at 11.
[56] *Id.* at 11 (footnotes omitted).
[57] Code, Ch. III, § 6.
[58] *Order II* at 4.
[59] *Id.* at 4–5.

> Because divorce requires establishing two households instead of one, it is almost always true that both parties will not be able to maintain the same standard of living once divorced that they enjoyed while married. But the fact that parties cannot continue to live at the marital standard of living *does not mean that the party with less income must get by with only the bare necessities of life while the other spouse maintains a high standard of living.*[60]

In light of this reasoning, we went on to observe that while it is "reasonable that a member spouse may continue to enjoy a higher standard of living post-divorce than the non-member spouse,"[61] the non-member's established standard of living is not "irrelevant to the maintenance analysis."[62] We instructed the court to take into consideration Wife's ability to "afford to support a reasonable middle-class lifestyle."[63]

Here, Wife receives well over $700,000 in per-capita payments per year.[64] While we recognize and appreciate that she has her own expenses, which are significant, her income more than suffices to support her expenses *and* substantial maintenance to Husband.

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[60] *Appellate Opinion* at 13 (emphasis added) (quotation omitted); *see also Arundel v. Arundel*, 281 N.W.2d 663, 666 (Minn. 1979) ("Such support is not simply that which will supply her with the bare necessities of life, but such a sum as will keep her in the situation and condition in which respondent's means entitle her to live.").
[61] *Appellate Opinion* at 14; *see also Welch*, 2 Shak A.C. at 22 (reasoning that "the unique character of per capita income is a proper factor for the Trial Court to consider in evaluating a request for spousal maintenance, including the fact that the nonmember seeking spousal maintenance cannot be considered to have assisted in generating it").
[62] *Appellate Opinion* at 14.
[63] *Id.*
[64] Pet. Ex. 8.

The court went on to evaluate Husband's budgetary needs.[65] This, again, was a conflation of considerations. The parties were married for 18 years.[66] During the duration of their relationship, they lived in a home valued at $850,000, they purchased numerous vehicles, traveled often, and spent significant money on gambling.[67] They also paid for gym memberships, personal training, healthy food, and nice clothing.[68] While it is true, as the court emphasized, that they overspent, this fact does not rebuff the conclusion that their standard of living was high.

To be sure, Husband may no longer be able to have the standard of living he once enjoyed. But he is entitled to spousal maintenance that will support more than a minimum budget for a single person with no children.[69] The standard of living that the parties enjoyed during the marriage weighs in favor of higher spousal maintenance to help support Husband's enjoyment of certain amenities that some married couples have not enjoyed, such as nicer clothing and food, a comfortable home, and travel.

4. Financial Needs

The fourth consideration in awarding spousal maintenance is the financial needs of both spouses.[70] In its January 2016 Order, the court relied on *Welch*, in which this Court held that "what are commonly considered luxury items cannot be considered to

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[65] *Order II* at 5-6.
[66] Tr. at 13.
[67] *Id.* at 27, 37–38, 61–87, 116–17, 120–23, 175–76; Pet. Ex. 16.
[68] Tr. 128, 188–90.
[69] *See Order II* at 5.
[70] Code, Ch. III, § 6.

serve to meet 'financial needs,' even if a party has become accustomed to them over time."[71] The court then proceeded to evaluate the budgets presented by the parties.[72]

In our previous opinion, we expressly instructed the court to consider Husband's need for retirement.[73] The court rejected our instruction, noting that it was Husband's own fault that he had not invested in his retirement while in the marriage.[74] But the fact that Husband previously chose not to save for retirement does not negate his *current need* to save for retirement. Moreover, Husband's choice was not entirely unreasonable, given his circumstances. He and Wife were married for 18 years, during which time they received hundreds of thousands of dollars in per-capita payments per year, with the significant likelihood that such payments would continue.[75] Assuming that Husband did not foresee the marriage dissolving from day one, it was reasonable for him to rely on Wife's per-capita payments to continue to support them.[76] Thus, Husband's need for retirement savings drastically changed as a result of this marriage-

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[71] *Order II* at 6 (citing *Welch*, 2 Shak. A.C. at 13).
[72] *Id.*
[73] *Appellate Opinion* at 16.
[74] *Id.* at 6–7.
[75] Tr. at 13, 22–27; *see* Gaming Revenue Allocation Amendments to Business Proceeds Distribution Ordinance, Ordinance No. 10-27-93-002.
[76] We noted the same, with respect to Wife's budget, in our previous opinion: "[A]lthough Wife also has no retirement funds, the reality is that unless the Community were to cease its gaming enterprise (a possibility we view as being highly unlikely), she will not need any source of revenue other than per-capita payments." *Appellate Opinion* at 18.

dissolution. Retirement savings in the amount of $500 per month must be included as an expense for Husband's monthly budget.

In our previous opinion, we found that the court clearly erred by finding that Husband can make $3,085 per month—$487 of which was overtime pay—when Husband provided uncontroverted testimony that Natural Light was no longer offering overtime hours.[77] Nonetheless, in its January 2016 Order, the court retained its finding that Husband's monthly income is $3,085 per month.[78] This finding is, again, clearly erroneous. And regardless, we are of the opinion that the court should not include overtime pay in its award of spousal maintenance. A spouse should not be expected to work more than 40 hours per week to afford his or her *reasonable* living expenses. Therefore, Husband's monthly income is $2,598.

We also found that the court clearly erred by not accounting for taxes taken from Husband's income.[79] In its January 2016 Order, the court attempted to correct this error, by accounting for $680.90 in monthly taxes.[80] This tax amount, however, was calculated based on a monthly income of $3,085.[81] Because we are concerned with only $2,598 of Husband's monthly income, we have adjusted the monthly tax amount to $573.40,

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[77] *Appellate Opinion* at 17.
[78] *Order II* at 5.
[79] *Appellate Opinion* at 17.
[80] *Order II* at 5.
[81] *Id.*

which assumes roughly the same tax rate as used in the court's January 2016 Order.[82] Thus, Husband's net income should be $2,024.60 per month.

In our previous opinion, we also found that the court clearly erred in making the following findings with respect to Husband's monthly expenses: (1) that $700 per month constituted a reasonable expense for housing; and (2) that Husband should have no expense for home maintenance, electricity, heating, and water/sewer/garbage.[83] In its January 2016 Order, the court found that Husband's reasonable housing expense was $900 per month.[84] But the court provided no justification for this finding, and we again hold that it amounts to clear error. Given the standard of living established by the parties, we agree with Husband that $1,800 per month is an appropriate budget for a modest three-bedroom home.

The court did include a budget for electricity and heating, but no budget for home maintenance or water/sewer/garbage.[85] Again, we hold that the court's finding that these expenses should not be included in Husband's monthly budget is clear error.

For the above reasons, we believe that Husband's budget should be adjusted from $3,580 per month to $5,000 per month. And in light of our conclusion that Husband's net income is $2,024.60 per month, we conclude that he has a monthly deficit of approximately $3,000. It is this deficit that spousal-maintenance should mitigate.

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[82] *Id.* at 5.
[83] *Appellate Opinion* at 17.
[84] *Order II* at 3.
[85] *Order II* at 3.

Finally, in our previous opinion, we instructed the court to do two things: (1) "consider that Wife will have reduced vehicle payments from the budget she originally presented," because she intended to sell many of her vehicles; and (2) "subject Wife's budget to the same scrutiny as Husband's when deciding what level of maintenance she can afford."[86] Instead, the court again accepted Wife's proposed budget without adjustment.[87] However, because Wife's income is sufficient for her to satisfy her proposed expenses and Husband's monthly income deficit, we find this error harmless.

Given the above reasoning, we believe the financial-needs factor weighs in favor of a spousal-maintenance award in the amount of $3,000 per month.

5. Other Considerations

The Code provides that the court may consider other factors when awarding spousal maintenance.[88] In its January 2016 Order, the court noted two additional considerations that it believed "favored no award of maintenance."[89] First, the court considered the inequality in the parties' support of each other's interests.[90] Specifically, the court compared Wife's attendance to and financial support for Husband's drag races, with Husband's efforts to avoid vacations to Florida with Wife.[91] Second, the

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[86] *Appellate Opinion* at 18.
[87] *Order II* at 7.
[88] Code, Ch. III, § 6.
[89] *Order II* at 7–8.
[90] *Id.* at 7.
[91] *Id.*

court considered Husband's credibility.[92] It reflected on what it found to be false or unsupported representations by Husband regarding his actual expenses and Wife's conduct during the marriage.[93] But regardless of whether the court correctly characterized Husband's actions during the marriage and dissolution proceedings, the Domestic Relations Code expressly prohibits the court from considering "misconduct of either spouse when making its [maintenance] determination."[94] Therefore, the court erred, as a matter of law, by incorporating these considerations into its maintenance calculation.

Rather than reflect on Husband's misconduct, the court should have looked to our June 2015 opinion, in which we clearly stated that the gross disparity in the parties' income "should have militated in favor of a higher and longer-term maintenance award."[95] The facts relevant to this consideration have not changed since our June 2015 opinion. Even assuming Husband will always have overtime pay, Wife's income is roughly *20 times* Husband's.[96] And in light of uncontroverted testimony that Husband does not have the opportunity to make significantly more money from his current

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[92] *Id.* at 7–8.
[93] *Id.*
[94] Code, Ch. III, § 6.
[95] *Id.* at 20.
[96] *See* Pet. Exs. 4–7, 11.

employer,[97] the disparity in the parties' income likely will remain significant for the foreseeable future.

Husband's spousal maintenance should be not only greater than what is absolutely necessary to accommodate his bare necessities, but also what is necessary to reduce the gross disproportionateness of his income. Further, given the low probability that Husband's income will significantly improve in the near future, Husband's spousal maintenance should continue for a duration far exceeding 18 months, if he is to have any opportunity to supplant it with his own income. Therefore, Husband should be awarded higher and longer-term spousal maintenance.

IV. Conclusion

For all these reasons, we reverse the court's order awarding Husband maintenance in the amount of $1,500 per month for a period of 18 months. We remand with instructions to the court to award Husband maintenance in the amount of $3,000 per month for a period of 9 years. This award adequately reflects the considerations addressed above by ensuring that Husband is able to meet his financial needs, have a standard of living that is not untenably disproportionate to that which he had during the marriage, and ensure that he has time to transition into a healthy career.

We understand that it is unusual for an appellate court to set a maintenance amount rather than remanding.[98] In this case, however, we find it necessary. After the

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[97] Tr. at 250.

trial court's first paltry maintenance award, we issued a 23-page opinion outlining the error and remanding with explicit instructions. We did not expect that just a few months later, the matter would be back before us with the trial court having left the duration of the maintenance award intact and amount of maintenance only increased by $500 per month.

The surprising result of the remand is made even more so when we consider that on remand, *even Wife argued that Husband was entitled to $2,500 per month for five years.*[99] Husband argued that he was entitled to permanent spousal-maintenance in the amount of $6,000 per month.[100] Ordinarily, unless the law were clearly to the contrary, a maintenance award would fall somewhere between what each of the parties requested. But the trial court ignored both the parties' arguments and this Court's instructions, and awarded only $1,500 per month for 18 months. Not only did that figure leave us "with the definite and firm conviction that a mistake has been committed,"[101] but it left us

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[98] It is not unprecedented, though. For instance, in *Theissen-Nonnemacher, Inc. v. Dutt*, the Minnesota Court of Appeals modified judgments entered for both parties, to remedy errors made by the district court. 393 N.W.2d 397, 401 (Minn. App. 1986). Even in the context of marriage-dissolutions, the Minnesota Supreme Court has, on occasion, eschewed the traditional practice of remanding unresolved matters for resolution by district courts. *See John v. John*, 322 N.W.2d 347, 348–49 & n.1 (Minn. 1982) (reasoning that "the interests of justice require[d] a final disposition," where appellant already had three attorneys and numerous postponements and the matter had been "unusually protracted").

[99] *See Stade-Lieske v. Lieske*, No. 783-14, Pet. Br. at 1 (Sept. 28, 2015) (requesting order for a spousal-maintenance award not exceeding $2,500 per month).

[100] *Stade-Lieske v. Lieske*, No. 783-14, Resp. Br. at 13 (Oct. 19, 2015).

[101] *SMSC Gaming Enterprise v. Prescott*, 2 Shak. A.C. at 2.

with the firm conviction that further remand would be futile—not to mention costly to the parties, who deserve to be able to put this dissolution behind them. We hope that they may now do so.

So ordered.

Dated: July 26, 2016

Judge John Jacobson

Judge Vanya S. Hogen

Pro Tem Judge Terry Mason Moore

COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

James Van Nguyen,

Appellant,

vs. File No. Ct. App. 044-77

Amanda Gustafson,

Respondent.

Memorandum and Order

Summary

In the marriage dissolution proceeding which gives rise to this appeal, the Appellant, James Van Nguyen ("Nguyen") contends that the Courts of the Shakopee Mdewakanton Sioux Community lack personal jurisdiction over him, and also lack subject-matter over his marriage.

The Community's Trial Court has rejected Nguyen's jurisdictional contentions, has denied his motion to dismiss, and has established a schedule for pretrial proceedings and for trial. Nguyen seeks interlocutory review by this Court of the Trial Court's jurisdictional decision. Rule 31(a) of the Rules of Civil Procedure of the Shakopee Mdewakanton Sioux Community Tribal Court ("the Civil Rules") provides that a Trial Court order can be appealed only if, under federal law, such an order would be appealable had it been issued by a federal court. And under federal law, the decision of a United States District Court denying a motion to dismiss on either personal or subject-matter jurisdictional grounds is not appealable until the District Court has finally resolved all the issues that are pending between the parties in the litigation.

We therefore conclude that at this time the Trial Court's denial of Nguyen's motion to dismiss is not now properly appealable to this Court.

Background

Gustafson is a member of the Shakopee Mdewakanton Sioux Community ("the Community"), Nguyen is not a member of any Indian tribe. The parties have been married for approximately three and

one-half years, and they are the parents of one child, who is a member of the Community. Both before and during their marriage they have been involved in several proceedings in the Community's courts[1]. Gustafson filed a Petition, seeking to dissolve the marriage, and seeking orders both with respect to the child and with respect to certain real and personal property, on July 10, 2017. Nguyen moved to dismiss; and after receiving briefing and hearing oral argument, Judge Henry M. Buffalo, Jr. denied that motion on November 10, 2017, explaining his decision in a forty-five-page written memorandum.

On December 4, 2017, Nguyen filed a Notice of Appeal with this Court, asking us to review Judge Buffalo's decision, and on December 8, 2017 Nguyen asked Judge Buffalo to stay the effect the decision, and to certify for immediate appeal the jurisdictional questions resolved therein. On December 11, 2017, Judge Buffalo denied those requests; and also on December 11, 2017, we directed the parties to brief the single question of whether Nguyen's appeal could properly be heard by us before the Trial Court has finally resolved all the claims presented to it by the parties.

Having now considered the arguments raised in the parties' briefs, we conclude that an interlocutory appeal of Judge Buffalo's November 10, 2017 decision cannot properly be heard by this Court.

Discussion

Rule 31(a) of our Rules of Civil Procedure provides;

> Appealable Orders. In any action before the Tribal Court where a three-Judge panel has not heard the matter, a party may appeal any decision of the assigned Judge that would be appealable if the decision had been made by a judge of a United States District Court. Actions that are heard by a three-judge panel of the Tribal Court under Rule 25 shall be deemed to have been the subject of a consolidated trial and appeal, and decision of the Tribal Court in those matters shall not be the subject of further appeal.

As a general rule, federal courts of appeal "have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." 28 U.S.C. § 1291. "Ordinarily, a district court order is not final until it has resolved all claims as to all parties." *See Porter v. Zook*, 803 F.3d 694, 696 (4th Cir. 2015). That is, "a final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *See Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs*, 134 S.Ct. 773, 779 (2014) (internal quotation marks omitted). Here, Judge Buffalo's order is not "final" because it only

[1] The November 10, 2017 decision of the Trial Court discusses in detail the past and pending judicial proceedings in the Community's courts and in other courts.

adjudicates the jurisdiction of the Tribal Court as it pertains to the Petition while leaving merits of the Petition unresolved.

Nguyen argues, however that his appeal should nonetheless be heard under the "collateral order doctrine", which creates a narrow exception to the generally applicable requirement of finality[2]. In federal jurisprudence, the collateral order doctrine identifies a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To qualify for collateral order review, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *See Will v. Hallock*, 546 U.S. 345, 349 (2006) (alterations in original) (internal quotation marks omitted). The collateral order doctrine is a "narrow exception" to the final-judgment rule, *Pena-Calleja v. Ring*, 720 F.3d 988, 989 (8th Cir. 2013), and the Supreme Court has "repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule . . . that a party is entitled to bring a single appeal, to be deferred until final judgment has been entered." *See Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 869 (1994) (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982)); *see also Will*, 546 U.S. at 350, 126 S.Ct. 952 (explaining that, "although the Court has been asked many times to expand the small class of collaterally appealable orders, we have instead kept it narrow and selective in its membership" (internal quotation marks omitted)).

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[2] Nguyen's Notice of Basis for Appeal and Request for Stay of Proceeding filed December 8, 2017 states that his appeal is "an appeal of a Collateral Order pursuant to 28 U.S.C. § 1292 and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)." Notice at 1. But Nguyen is incorrect insofar as his statement indicates that the collateral order doctrine, when satisfied, gives rise to jurisdiction under Section 1292, which lists the specific types of interlocutory orders that are appealable notwithstanding the finality of judgment, in addition to setting forth the process for taking appeals of orders involving controlling questions of law so certified by the district court. The Supreme Court case upon which Nguyen relies—*Cohen v. Beneficial Industrial Loan Corp.*—makes clear that when the elements of the collateral order doctrine are met, the result is a final appealable judgment under 28 U.S.C. § 1291. *Cohen*, 337 U.S. at 546.

Federal precedent across the Circuits dictates that a denial of a motion for lack of personal jurisdiction is not a decision that falls within the collateral order doctrine. This is because such a denial does not prevent the aggrieved party from vindicating rights by appealing that decision after final judgment on the merits. *See, e.g., Van Cauwenberghe v. Biard*, 486 U.S. 517, 527 (1988) ("Because the right not to be subject to a binding judgment may be effectively vindicated following final judgment, we have held that the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order."); *see also Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1024-26 (9th Cir. 2010) (stating that a "denial of a motion to dismiss for lack of personal jurisdiction is neither a final decision nor appealable under the collateral order doctrine"); *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1297 (11th Cir. 2000) ("The denial of a motion to dismiss for lack of personal jurisdiction is not, in itself, immediately appealable under the 'collateral order doctrine' . . . .").

Similarly, while the denial of a motion to dismiss for lack of subject matter jurisdiction predicated on a claim of immunity is immediately appealable, *see Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985), "the denial of a motion to dismiss for lack of subject-matter jurisdiction on other grounds is generally not subject to interlocutory review," *Intel Corp. v. Commonwealth Sci. & Indus. Research Organisation*, 455 F.3d 1364, 1369 (Fed. Cir. 2006) (citing *Catlin v. United States,* 324 U.S. 229, 236 (1945) ("[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable.")); *see Gov't of the Virgin Islands v. Hodge*, 359 F.3d 312, 321 (3d Cir. 2004) ("'[N]on-immunity based motions to dismiss for want of subject matter jurisdiction are not ordinarily entitled to interlocutory review.'" (quoting *Merritt v. Shuttle, Inc.,* 187 F.3d 263, 268 (2d Cir. 1999)). Here, Nguyen's challenge to the Tribal Court's subject-matter jurisdiction is not an immunity-based challenge, but instead is predicated on his assertion that the Court lacks subject matter jurisdiction pursuant to *Montana v. United States*, 540 U.S. 544 (1981), the Indian Child Welfare Act, and Public Law 280. As a result, federal case law dictates that Nguyen's challenge is a "non-immunity based motion [ ] to dismiss for want of subject matter jurisdiction" that is not immediately reviewable. *See Hodge*, 359 F.3d at 321.

Without reference to the foregoing case law, Nguyen argues that he has satisfied the three elements of the collateral order doctrine. As to the third element, Nguyen cites two federal cases for the proposition that his motion to dismiss "would otherwise be effectively unreviewable (the

asserted rights for jurisdiction of the Tribal Court dissolution proceeding would be destroyed)" if Judge Buffalo's Order is not immediately appealable. Notice at 1. But neither case supports his argument. In the first, the Supreme Court held "that States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). Thus, *Puerto Rico Aqueduct* is consistent with the aforementioned line of federal authority holding that denials of claims of immunity are immediately appealable. After all, the Court's "ultimate justification" for its holding in *Puerto Rico Aqueduct* was "the importance of ensuring that the States' dignitary interests can be fully vindicated" through application of immunity—an interest noticeably absent in the matter before the Tribal Court. *See id.* at 146.

United States v. Archer-Daniels-Midland Co., 785 F.2d 206, 210 (8th Cir. 1986), is also unpersuasive. In *Archer-Daniels-Midland Co.*, the court held that the district court order denying defendants' motion contending that the government violated the rule protecting the secrecy of grand jury proceedings was an immediately appealable collateral order in part because it was "effectively unreviewable on appeal from a final judgment." *Id.* The Court reasoned that "[a]ny harm to [defendants'] interests which are sought to be protected by keeping grand jury proceedings secret cannot be undone by a later reversal of the district court order." *Id.* Further, the Court distinguished its decision from the Supreme Court's conclusion in *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 377 (1981), that denial of a motion to disqualify an opposing party's counsel may not be appealed under the collateral order doctrine because such an order can be effectively reviewed on appeal from a final judgment. The Court concluded that unlike in *Firestone*, the inability to immediately appeal the order would result in losing "the legal and practical value" of the rights defendants have asserted to the secrecy of the grand jury proceedings. *Archer-Daniels-Midland Co.*, 785 F.2d at 210.

Unlike in the situation in *Archer-Daniels-Midland*, Nguyen's inability to immediately appeal Judge Buffalo's order does not result in loss of "the legal and practical value" of the rights he has asserted. While Nguyen argues that he would be prejudiced by being forced to litigate the merits of a case over which the Tribal Court does not have jurisdiction, he nonetheless retains the ability to challenge the Court's jurisdiction on appeal after resolution of the merits. If that challenge is successful, Nguyen may also access the relief he now seeks:

dismissal of the Petition. Therefore, this is not a situation like in *Archer-Daniels-Midland* where inability to immediately appeal extinguishes the rights being advanced.

Finally, Nguyen cites us to a decision of the Minnesota Court of Appeals, *McGowan v. Our Saviour's Lutheran Church*, 527 N.W.2d 830 (Minn. 1995), in which interlocutory appeal was permitted from the denial of a motion to dismiss on personal jurisdiction grounds. But, whatever the force of the *McGowan* decision has for Minnesota state courts under Minnesota law, it does not reflect the federal precedents that are incorporated in, and govern, our Civil Rules.

Because Nguyen's challenges to the Trial Court's subject matter and personal jurisdiction are reviewable after adjudication of the merits of Gustafson's Petition, federal precedent makes it clear that it is inappropriate for us to permit interlocutory review of those challenges under the collateral order doctrine.

IT THEREFORE IS ORDERED that the instant appeal is dismissed, without prejudice, as procedurally premature under Rule 31(a) of the Rules of Civil Procedure of the Shakopee Mdewakanton Sioux Community Tribal Court

Dated: Jan. 30, 2018

Chief Judge John E. Jacobson

Judge Terry Mason Moore

Judge Jill E. Tompkins